The Young Man and The Law

Simeon E. Baldwin

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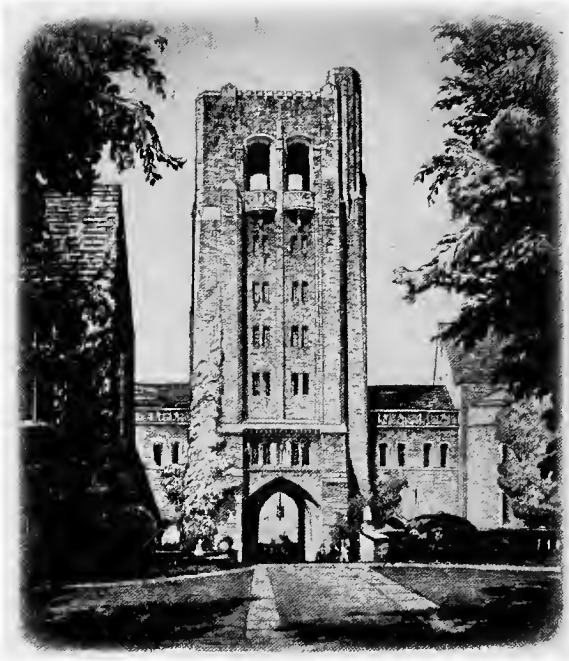

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THE YOUNG MAN AND THE LAW

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THE YOUNG MAN AND THE LAW

BY

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I DEDICATE THIS BOOK TO
THE MEMORY OF
RICHARD DUDLEY HUBBARD, LL.D.
GOVERNOR OF CONNECTICUT
Who gave me an early opportunity to serve
my state as a member of the Commission
to devise a plan for
Simplifying Civil Procedure

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CONTENTS

CHAPTER		PAGE
I	FOREWORD	1
II	ATTRACTIONS OF THE LEGAL PROFESSION	5
	1. The Majesty of the Law, and the Lawyer as Its Minister	5
	2. The Cultivation of the Mind and Heart Incident to the Legal Profession	12
	3. The Opportunities of the Lawyer for Public Service and Social Advancement	30
	4. The Opportunities of the Lawyer for Making Money	42
	5. The Spirit of Brotherhood in the Bar	60
	6. The Variety of Legal Business	62
III	OBJECTIONS TO CHOOSING THE LEGAL PROFESSION	71
	1. The Charge that It Leads to Dishonesty and Defense of Guilt	71
	2. The Tendency of the Legal Profession to Foster a Spirit of Roughness and Antagonism	87
	3. The Charge that Legal Procedure Is Antiquated and Unfair	91
IV	THE PERSONAL QUALITIES REQUISITE FOR SUCCESS IN THE LEGAL PROFESSION	106
V	THE EDUCATION REQUISITE FOR SUCCESS IN THE LEGAL PROFESSION	115
VI	THE IDEALS OF THE PROFESSION	142
	INDEX	155

THE YOUNG MAN AND THE LAW

CHAPTER I

FOREWORD

Choosing the profession that suits one's tastes. Roger Minott Sherman's comparison of the law and the ministry. Field of law constantly enlarging. The object of this book, and its order of arrangement.

THE choice of any vocation, for entering which a long period of careful preparation is requisite, is generally irrevocable. The law is a profession of that character. It ought not to be adopted, therefore, without full consideration. Personal preferences and disposition should be given full weight. That is done best which is done gladly and with feelings of pleasure in the doing. For one to follow a calling which is distasteful, because unsuited to his powers and inclination, is to court failure from the start.

Many years ago a theological student at Yale found himself with misgivings as to whether he had been wise in choosing the ministry for his profession. He had some leaning to the law, and wrote to Roger Minott Sherman, one of the leaders of the New England bar,

asking whether he could not "be an active and useful Christian and be a lawyer." The reply was that the good of man required that all useful departments of human employment should be occupied; that the legal profession in modern society was necessary and useful; and that the main question for any one in choosing his life work was, *What shall I love most to do?*

"I am aware," Sherman added, "of the force of habit, and of the deference paid to the maxim, 'choose the employment which is the most useful, and habit will make it the most agreeable.' This maxim is sophistical and erroneous. The enquiry is not, what employment is in itself most useful; but in what can the individual be most usefully employed? Habit may mitigate the pains of crossed inclination; but can never supply that energy which is derived from the current of the soul.

"'In this 'tis God directs; in that 'tis man.'" [1]

Sherman's counsel was asked at about the same time by a successful lawyer of ten years' standing, who was thinking, from conscientious motives, of studying for the ministry. He replied to him thus:

"One of the best schools for a practical divine is the bar. The amount of good which a person can perform as a minister if he attains the age of seventy, will be greater if he follows the practice of law for ten years than if his whole life were devoted to the clerical profession. Man must be drawn by the cords of a man: by those principles

[1] Beers, *Biographical Sketch of Roger Minott Sherman*, Bridgeport, 1882, p. 38,

of influence and action which are in his nature and can be thoroughly known from no book sacred or profane, but are discovered and understood by means of experience alone: he will be a poor practitioner in any fine or mechanic art whose accomplishments are derived wholly from books or theories. . . . Men who go directly from the divinity school to the pulpit are necessarily deficient, for many years at least, in this indispensable qualification for their office. . . . Were you now, sir, to enter upon the profession of divinity, the time you have devoted to the civil law will have been well spent. . . . You would be peculiarly able to render great service to the Christian cause." . . . "You ought to follow the dictates of your own heart: your inclination should be your rule of duty: you would be most useful in the employment with which you are most delighted." [1]

A man must look into his own heart, before he chooses his profession. "Know thyself" is the first and great commandment, at such a time. As Ruskin has said:

"We are not sent into this world to do anything into which we cannot put our hearts. We have certain work to do for our bread, and that is to be done strenuously; other work to do for our delight, and that is to be done heartily; neither is to be done by halves or shifts, but with a will; and what is not worth this effort is not to be done at all."

The law is not an easy profession. Its field is constantly enlarging. If any one can feel that he has mastered it as it stands to-day, he is far from having mastered what it will be ten years from to-day. The period of legal education never ends. The frontier recedes before each new step in advance.

[1] Beers, *Biographical Sketch of Roger Minott Sherman*, p. 32.

Hard work is the condition of all real success. Pre-eminently it is so to both the student, and the practitioner of law. It is not the object of this book either to induce any man to take it up as his life calling, or to dissuade him from it. It is its object to state fully and plainly both the advantages and disadvantages of the legal profession in the United States, the opportunities which it offers and the risks which it involves, the conditions of success, and the chances of failure. The general scheme of arrangement which has been followed is to consider first the attractions of the profession; then the main objections to engaging in it; then the personal qualities requisite for success in it; then the proper education for it; and finally its great ideals.

CHAPTER II

ATTRACTIONS OF THE LEGAL PROFESSION

1. *The Majesty of the Law, and the Lawyer as its Minister*

Relation of law to morals. Natural Law, as defined by Cicero. Custom the source of most law. Functions of Courts and lawyers, respectively, in determining the law. Law reports. The right of parties to suits to employ lawyers. Lawyers are officers of the court. Lawyers prevent many law suits. To bring suit, sometimes a duty. Spinoza's view. Law, our best inheritance. The lawyer as an *amicus curiæ*.

THE word Law is sometimes used to denote both that law which organized society enforces, and those rules of morals which find their support only in what we call the conscience of the individual or the conventions of unorganized society.

Cicero, in a lofty passage, describes law in this last aspect. "It is," he says, "not only older than peoples and commonwealths, but of equal age with that God who guards and rules heaven and earth. No law was ever written down that one man should contend with a great hostile force upon a bridge, and bid it to be destroyed behind him, yet none the less shall we judge that Cocles acted in that noble way under the law and empire of fortitude; nor if, in the reign of Tarquin,

there was no written law of Rome against adultery, did he nevertheless break an eternal law when he offered violence to Lucretia. For there was a reason proceeding from the nature of things, impelling to the right and dissuading from the wrong, which in fine begins to be law not when it is written, but when it originates. But it originates simultaneously with the divine mind. Wherefore the true and chief law apt for commanding and obeying is the unswerving reason of highest Jove." [1]

Law as administered by lawyers, is something narrower than this. It consists of rules of human conduct which organized political society recognizes and undertakes to enforce. But the soul of this law is not force but right. Law in human society is made for man. It is made for beings having in every country — considered as a mass — certain general notions of moral justice. These notions are the unwritten constitutions no positive law violating which can long endure.

The same thing is true of custom, and of judicial decisions supporting custom. If they are contrary to moral justice, the day will come when they will be abrogated, if not by legislation nor by disuse, then by the courts themselves.

Standards of social approval, in respect to law in all its senses, may change from age to age. If antiquated morality and antiquated law do not disappear together, one does not long survive the other. As Sir Frederick Pollock has remarked, "Legal justice aims at realizing

[1] Cicero, *De Legibus*, Lib. II, Cap. 4. Cf. ibid. Lib. I, Cap. XV, quoted *infra*, on page 147.

moral justice within its range, and its strength largely consists in the general feeling that this is so. Were the legal formulation of right permanently estranged from the moral judgments of good citizens, the State would be divided against itself." [1]

The power of recognizing and enforcing law in the United States is vested in the courts. Our legislatures make part of this law; the customary rules of conduct approved by the community, and accepted by the judicial authority, make another and greater part. For ascertaining what it is at any particular time and how it applies to any particular case, the decisions of the courts are the ultimate authority. The more important of those rendered in each State and in the United States are officially published from time to time, under the name of "Reports." They constitute in each case the ground of a judgment which secures the termination of a controversy in a particular manner ordered by the courts, after hearing from lawyers representing each of the opposing parties. They are often substantially an adoption of the line of reasoning presented at the bar on one side or the other. It is the function of lawyers to put their clients' cases before the court, and that of the judges to dispose of them according to law.

Human experience has shown that judges need the help of lawyers to aid them in coming to just conclusions. Hence in most of the United States there is no right to practice law except by a grant or license from

[1] Pollock, *First Book of Jurisprudence,* London, 1896, p. 31.

the State. Such a right is in the nature of a public franchise.[1]

In England, for centuries, men had to plead their own causes. If one who was ignorant or tongue-tied sued or was sued, he must nevertheless speak for himself. His adversary had a legal interest in the disadvantage due to his failings in these respects.[2]

It was found that this was not seldom the occasion of great injustice. Gradually the law was changed, and it became first the general rule and afterwards the universal rule, that parties to a lawsuit, whether it were civil or criminal, had the right to appear by counsel. Regulations were also adopted to secure to those who desired to enter the bar adequate opportunities for learning the law, and to require of them proof of good character, to be established by the favorable opinion of those already admitted to the profession.[3]

From the days of the earliest settlements in the United States, it has been generally recognized here that the institution of the bar made for good government. It promoted justice, and the lawyer was therefore given a certain *status* in the official organization of the judicial department. Every American lawyer is a minister of justice. He is an officer of court as fully as the Judge on the bench, or the sheriff who preserves order in the proceedings, or the clerk who records

[1] *In re* Co-Operative Law Co., 198 *New York Law Reports,* p. 479; 92 *Northeastern Reporter,* p. 15.

[2] Maitland and Montague, edited by Colby, *A Sketch of English Legal History,* New York and London, 1915, p. 94.

[3] O'Brien's Petition, 79 *Connecticut Law Reports,* p. 46.

them. He has a longer tenure of office than any of them. He holds for life. He never need retire, and never can be recalled, except as the court may disbar him, after a hearing, for some grave offense.

He may, however, be censured by the court, or otherwise subjected to discipline which stops short of disbarment. In arguing a cause, he must conform to the proprieties of the occasion and the settled rules of judicial procedure. As an officer of the court he speaks in a certain sense by its authority, and always in its presence. It is the duty of the Judge to interpose if he abuses his privileges by urging considerations obviously foreign to the cause, or invoking prejudice instead of reason. Such a course may not only call upon him a rebuke from the bench, but cost his client a verdict, should he afterwards obtain one. There are words and appeals which, once uttered to a jury, do their work on the instant beyond all power of remedy.[1]

It has been sometimes said that the existence of lawyers made men litigious.[2] To one who feels that he has been wronged, the power to get the opinion of a competent and disinterested adviser as to whether he has been or not and, if it be favorable to his claim, the opportunity to have it presented in proper form for the consideration of a court, certainly increases the number of meritorious actions brought. It probably

[1] See Hennessy vs. Metropolitan Life Ins. Co., *74 Connecticut Law Reports,* pp. 699, 708–710.

[2] See a discussion of this subject in Cicero, *De Legibus,* quoted *infra* on page 151.

lessens the number of groundless actions. A lawyer is in honor bound to bring no suits for which he thinks, on full consideration, there is no reasonable chance of a favorable issue. Probably every lawyer in large practice oftener advises that claims be settled or abandoned than that they should be the subject of a suit.

It is also true that insistence on one's rights, even at the expense of a law-suit, may sometimes be a duty. Society rests on a body of social rights. They must be maintained inviolate, if social health is to be preserved.

Because the Jewish authorities had excommunicated Spinoza for heresy, his right to share in his father's estate was denied by his sisters. He insisted that it was perfect, and took legal proceedings to establish his title. It was thus established, and he then released the property to his sisters, stating his opinion as to the principle involved thus: "In a State where just laws are in force, it is not only the right of every citizen, but his duty towards the common weal, to resist injustice to himself, lest peradventure evil men should find profit in their evil doing." [1]

Law, as a social necessity, cannot be guarded too carefully. It is our best inheritance from former generations. It is what gives value to life and property, because it is all that assures their possession. As Cicero said to the judges before whom he was pleading for Cæcina: "To one who succeeds to an estate a greater inheritance comes from the principles of right

[1] Quoted by Johnson T. Platt, *The Assertion of Rights,* Boston, 1884, p. 7.

and law, than from those by whom this estate was left to him." [1]

The lawyer and the courts share the high function of keeping these principles inviolate, and of enforcing them whenever called upon to do that service.

Nor to entitle the lawyer to be heard at the bar is it necessary that he should appear there to speak for a client. He is not only an officer of the court, but a friend of the court. As an officer he represents the interests of others. As a friend — *amicus curiæ* — he has the right to offer suggestions when they are made simply as aids to justice. This term describes a lawyer who, in a controversy in which he does not appear for either side, volunteers, with the consent of the court, to state what he conceives to be the law which should govern the decision. He sees a matter in dispute where he believes that justice might be better done if he declared his own view of the proper disposition of the contest, which is to be made by the judge. It is a piece of brotherly advice from one public agent to another. An intervention of this sort has often prevented the doing of injustice, or furthered the doing of a completer justice.

There was such an incident on the trial of Algernon Sidney for high treason. By the law of England as it then stood (1683) a man accused of that crime could not have the aid of counsel. There was a technical defect in the indictment. A barrister rose, as an *amicus curiæ*, and brought it to the attention of the

[1] Cicero, *Oratio pro A. Cæcina*, Cap. XXVI.

court. Chief Justice Jeffreys, who was presiding, overruled the objection on this score (and properly), but added, "We thank you for your friendship." [1]

2. *The Cultivation of the Mind and Heart Incident to the Legal Profession*

Its spiritual benefit. The demand for metaphysical and historical knowledge. Bolingbroke's opinion. Law constantly changing. Its procedure growing less formal. Less emphasis given to study of ancient technicalities. Comparative Law. Legal traditions. Practice of Rhetoric and Logic. John Adams' advice. Legal maxims only half truths. Dialectic. The spirit of all law is the rule of right rather than of authority. Haller's view. Lawyers must study into the origin and causes of things, and in a philosophical way. Justinian's description of their work. Forms of procedure have developed rights. Law, both an abstract study and a practical art. It promotes a spirit of reverence. It has spread political liberty and is now spreading political justice. Its appeal to the heart and feelings. Here youth is a help. The jury, as a teacher of psychology. Horne Tooke's characterization of it. Legal oratory. It is consistent with concisement of statement. Insisting on the main points of argument. Personal honesty. Law, the science of enforceable rights. It limits personal and social duties. To determine these limits, calls on the lawyer for original research. The lawyer finds aid in general literature. His share in legislation.

When the poet, Sill, was choosing his vocation, he was at first inclined to the law, on account, he said, of "the benefit which it would be to himself spiritually." "As Kingsley puts it," he added, "we are set down before that greatest world-problem —'Given self, to find

[1] Sidney, *Discourses on Government*, New York ed., 1805, Vol. I, pp. 242, 234.

God.' So, considering that for such tasks the mind needs every preparation, skill and practice in drawing close distinctions, subtileness in detecting sophistry, strength and patience to work at a train of thought continuously long enough to follow its consequences *clear out*, and some systematized memory (if for nothing but holding and duly furnishing your own thoughts when needed) — I say, seeing no better — or rather, no *other* — way to gain these but by entering the law, thitherwards I have set my face." [1]

The mind and heart of every lawyer, who is in the least degree worthy of the name, must be in some measure strengthened by the tasks which the necessary work of his calling forces him in some measure to perform.

In Thackeray's *Pendennis*, he contrasts two lawyers, one weary of law and giving himself to literature; the other devoted to law, and so — says Thackeray — laboriously devoting great talents to a mean subject, to the exclusion of "all higher thoughts, all better things."

I do not think that this description of the great satirist strikes a responsive chord in the breast of any American lawyer. Whatever else the law may be, it is no mean subject of pursuit, and least of all in the United States. Lord Bolingbroke, in describing the legal profession of his day and its general ignorance of history, spoke of it as "in its nature the noblest and most beneficial to mankind, in its abuse and debasement the most

[1] Parker, *Life and Work of Edward Rowland Sill*, Boston, 1915, p. 55.

sordid and the most pernicious. A lawyer," he added, "now is nothing more (I speak of ninety-nine in a hundred at least), to use some of Tully's words, 'nisi leguleius quidem cautus, et acutus praeco actionum, cantor formularum, auceps syllabarum.' But there have been lawyers that were orators, philosophers, historians: there have been Bacons and Clarendons. There will be none such any more, till in some better age true ambition, or the love of fame, prevails over avarice, and till men find leisure and encouragement to prepare themselves for the exercise of this profession, by climbing up to the vantage ground (so my Lord Bacon calls it) of Science, instead of groveling all their lives below, in a mean but gainful application of all the little arts of chicane. Till this happen, the profession of the law will scarce deserve to be ranked among the learned professions. And whenever it happens, one of the vantage grounds to which men must climb, is Metaphysical, and the other, Historical Knowledge."

An American bar hardly existed when Bolingbroke wrote this, nearly two hundred years ago, but as soon as the legal profession was fairly established here, it recognized the duty and the advantages of cultivating historical investigation.

Law is the most enduring creation of civilized society. It endures because it is in a state of perpetual change. It is, however, such a change as is incident to all life. The main structure of the man remains apparently much the same from year to year. The tissues are insensibly and invisibly renewed. Only by comparing the

human frame as it appears at the beginning and at the close of a considerable period of time, do we perceive clearly what alterations have been wrought.

It is so with legal institutions. In substance they have come down from former ages. In certain particulars they are inherited without change; in more they have become something unmistakably different.

The law of a nation is viewed by every generation from its own standpoint. Every generation of judges restates a large part of it from their standpoint. Legislation is always affecting the "common" or customary law. Legal procedure, in both English and American courts, has been made far simpler during the past half century. More and more of its ancient rules have been outgrown, and the framing of better ones confided to the courts. Antique terms of technical description have become less and less the subject of study. All this has relieved the law student of a heavy burden.

Down to the last quarter of the nineteenth century, the historical study of English law was commonly made needlessly dry by paying too much attention to what was archaic and obsolete in it. It is true, as Sir Walter Scott has said in *Guy Mannering*, that without a knowledge of history a lawyer is a mechanic, instead of what he should be — an architect. Nevertheless that knowledge is pushed too far if it is sought to extend it to petty details of ancient tenures or procedure, which throw no light on modern conditions of legal theory or practice. This has now become the general rule of practice in American law schools, and the stu-

dent is no longer forced to spend his mind on such books as *Coke on Littleton* or *Chitty on Pleading*. In fact, in this country they never had the place held by them in England.

The American lawyer, viewed as an architect, has also had the advantage of new opportunities for the study of comparative law. A bureau of the American Bar Association has been created to promote it. The truth is more widely recognized of Savigny's position that the law of every country is part of the life of the nation, inhering in its very body, and not to be taken off or put on like a new garment, at pleasure.

History and tradition are near of kin. The bar has its uplifting traditions, with which all who enter it are expected to be acquainted. As Professor Wigmore has said, they affect, to a lawyer, the " whole atmosphere of life's behavior."

But history is only one of the branches of science that lawyers must cultivate. Rhetoric and logic are two others, whether studied in their technical forms, or simply in outline as universal tools of argumentation. Ability to make a clear statement, to reason well, and to detect the fallacies put forward by another, is the best passport to success for a true lawyer.

President John Adams, writing in 1800 to his son Thomas, who had recently been admitted to the bar, gives him this sound advice:

" I always rejoice to hear of your Arguing Cases. This Arguing is the way to business. Argue; Argue; Argue; forever when you can, and never be concerned about the

issue, any further than you ought to interest yourself for truth and Justice. If you Speak in public though you lose your cause, it will serve your reputation, if you Speak well, as much as if you gained it. Hard Study and close Application to Business will infallibly increase your Business till it is Commensurate with your Necessities and affords you a Surplus. Science and Literature will assist your reputation as much as law." [1]

Law has certain points in common with mathematics. It proceeds from axiomatic assertions, called maxims. They are too short to be universally true. But so far as they are true, they form an irresistible major premise, when the facts to which they apply constitute the minor one.

It is a frequent task for a lawyer to exclude them from the position of a legal premise, because they really are a statement of a rule of morals, only. The law has no remedy for the violation of a moral right unless it be also the violation of a legal right. Otherwise it belongs only to conscience or social opinion to prescribe the penalty. Law falls short of honor. She does not try to force men to be virtuous. *Non omne quod licet honestum est.*[2]

A maxim may also, when carefully analyzed, prove to be meaningless as applied to many acts, which at first sight it would seem to govern. *Sic utere tuo ut alienum non laedas* is one of these. Taken literally it would forbid any injury to another's property. I may own a

[1] *Massachusetts Historical Society Proceedings,* Vol. XLIX, p. 466.

[2] *Digest of Justinian,* Lib. L, Tit. XXVII, 144.

vacant lot between my house and my next neighbor's. It has never been built on. If I should build on it, it would lessen the sun-light and fresh air which he has been enjoying. Nevertheless the law, and morality also, would not censure me for exercising my right, as owner, to improve my property. It injures my neighbor, but it is not unjust to him.

One must scrutinize the premises in all argumentation. As Schopenhauer has said, "It is not so easy for any one to think or draw an inference contrary to the laws of logic; false judgments are frequent; false conclusions, very rare."

A lawyer uses logic in coming to his conclusions in matters as to which he may be consulted, which are not brought before a court. He uses "Dialectic" in arguing as to the law affecting such matters. Logic is used to get at the truth. Dialectic he engages in to obtain from a judicial authority a decision of disputed points in favor of his client. The lawyer in a dialectical controversy often does not himself know whether his client is in the right or not. He often believes that he is and is mistaken. The lawyer on each side often believes that his client is in the right. "Truth is in the depths."[1] It is the business of the advocate to ascertain it, if he can; but he need not be disappointed if he often fails. The just cause however is seldom lost, if it is carried to a court of last resort. Milton was right when he said:

[1] Schopenhauer, *The Art of Controversy*, etc. Translated by T. Bailey Saunders, London, 1896, pp. 7, 11,

"Who ever knew truth put to the worst in a free and open encounter? For who knows not that Truth is strong next to the Almighty? She needs no policies, no stratagems to make her victorious. These are the shifts that Error uses against her power."

There is nothing higher or better, open to human effort, than the administration of justice and right between man and man, and between man and the State. There may be at times a right, the exercise of which leads to seeming injustice. It bears hard on some particular man; but it is because he has in some way put himself in a false position. The inmost spirit of the law is the rule of right, and the great office of the lawyer and the judge is to enforce it.

Albert Haller's parents desired him to study law. He refused because, says one of his contemporaries, "his active mind could not submit to follow a profession which would limit his inquiries; which entirely depended on precedent and authority; and which, to use his own quotation from Horace, in a letter to his friend Bonnet, obliged him '*Jurare in verba magistri.*'"

This was a false conception of a lawyer's studies, two hundred years ago, and there would be still less reason for holding it now. In determining what is the rule of right, in any particular case, there is often occasion for a resort to a philosophical inquiry into the causes of things. Lord Chief Justice Mansfield brought into the common law many of the rules laid down by the jurists whose opinions gave its form to the Roman law as Justinian left it. Nor did this great judge stop short with

Rome. In his discourse on taking his seat as Chief Justice, he said that Socrates was "the great lawyer of antiquity, since the first principles of all law are derived from his philosophy."

Those who have reached an advanced point in the pursuit of any department of science soon perceive that the acquisition of further knowledge of it consists less in gaining new notions or learning new facts than in gaining a better perception of the relations between those which we already possess. Here the Socratic method of learning appeals strongly to a scholarly lawyer. What is his relation to the State? What does he owe it? What does it owe him?

Such questions of obligation under existing laws and institutions are of deep interest to every man, but especially to one like a lawyer, who stands in a quasi-public position of official responsibility. They are subjects to understand the bearings of which clearly a man might profitably study law, though never meaning to practice it.

There is a kind of legal scholarship which wastes itself by diffusion, and culminates in vague and uncertain generalities. Some one has said that an interest in general ideas is apt to mean an absence of particular knowledge. It was sarcastically remarked of Lord Brougham that he knew something of the laws of every country except his own. Such criticisms are seldom just. In Brougham's case they certainly were not. The best lawyers are those who are capable of taking the widest views, and understand a subject from the

bottom up. The science which they profess drives them towards a philosophic method of inquiry. They must gain the power of analyzing, of distinguishing, of combining.

The pandects of Justinian commence with stating the office of a lawyer. "Law," it is said, "is the art of what is good and equitable, of which lawyers are deservedly called the priests, for they cultivate justice and profess a close knowledge of what is good and equitable, separating the equitable from the inequitable; distinguishing the lawful from the unlawful; desiring to make men good, not only from fear of punishment, but also the influence of rewards; maintaining, if I err not, a true, not a pretended philosophy." [1]

Whether law is to be regarded as in its origin "the conscious command of a supreme authority, or an unconscious growth in the life of human society," [2] or as proceeding from both united, is one of those questions which will invite the attention of all law students of a philosophic turn of mind.

It might at first sight seem that philosophy had little to do with legal procedure. But the theory of procedure at each stage, can only be understood by studying its relation to the history, theology, metaphysics, logic and psychology of the times in which it came to prevail. Its roots run deep, as all will find, who try to substitute something that they deem better. The forms of pleading have been in all earlier societies the creator

[1] Dig, Lib. I, Tit. I, *de Justitia et Jure*, § 1.

[2] Carter, *Law, its Origin, Growth, and Function*, New York, 1907, p. vii.

and definer of legal rights. Of the rules of evidence some have through long ages been the creators of wrongs. It has been said that proof is the daughter of doubt, and the mother of verity. It has too often been mother to the exclusion of truth and the condemnation of innocence. The reasons for changes of procedure made in the past call for close examination, were it only to assist in determining whether further changes are needed now.

Law has two aspects. It is an abstract study. It is also a practical art. Those who propose to make it their profession ought to examine it in both lights, but they must, at all events, seek to acquaint themselves with its vital characteristics, as they appeal to the mind and heart.

What is fundamental and permanent in law is most worth attention, because it is either the best of human achievements, or the best endowment of the human race. We may call it the law of nature, or we may give it a name of less dignity and look upon it not as a discovery of something originating in a higher power, but simply as a happy invention of men. In either case it repays the closest study: in either it demands our reverential regard.

Reverence for what we feel to be superior to ourselves is one of the greatest qualities of national life. It may take the shape of reverence for God; for the head of the State; for a military superior; for a superior in wisdom; for ancestors; for age; for ancient institutions. For us in the United States, reverence — aside from

that for the divine — is best bestowed on what governs us — laws, not men.

It is a great thought for a lawyer, and one never to be forgotten, that his office binds him and enables him to promote reverence for law. That, as Lincoln once said, should be "the political religion of the nation." [1] If any of our laws prove unjust or unsuited to the times, it is easy for us to repeal them; but while they stand, it is the high office of the lawyer to see that they are respected and obeyed.

Our common law is a glorious inheritance. Its principles and history give a renewing power of adaptation to changing circumstances. The task of the nineteenth century was the definition and the spread of political liberty. That of the twentieth is the definition and the spread of political justice.

Governor Andrew of Massachusetts, in describing the inherent vitality of the common law, observed that one might say of it, as the author of the Epistle to the Hebrews said of a priest after the order of Melchisedec, that it was "made not after the law of a carnal commandment, but after the power of an endless life." [2]

Reverence for law is a guaranty of good conduct. Wherever it is predominant as a national trait, it makes for social order. The lawyer who feels such a reverence will be unwilling to advise what the law does not sanction, and quick to see whether his client's position is compatible with it. He is himself, also, as an individ-

[1] Hill, *Lincoln the Lawyer*, New York, 1906, p. 44.

[2] *Hebrews*, Ch. VII, 16.

ual, restrained by the influence of his legal training from acts of violence. If he is wronged, and satisfaction be refused, he knows that the proper remedy to reclaim his legal rights is by process of law. If his client is wronged, he will advise that course to him. "*Nec juri quidquam tam inimicum quam vis; nec equitati quidquam tam infestum est quam convocati homines et armati.*" [1]

It has been said by Professor Jacks that there is a point in the high development of the human mind, at which reason falls under the law of diminishing returns. The output lessens, or at least increases more slowly. But this can never be asserted of an expansion of what belongs to the heart of man. And here the young man at the bar may exert a power greater than his elders. His feelings are fresher and more at his command. We have Burke's authority for saying that the reasoning powers also are stronger in youth, though the lack of knowledge to work upon is too small to make any great show with. How can the young lawyer excel in seeing or stating the relations of men, when he knows from personal experience so little as to the facts out of which these relations come? On the other hand, the kingdom of the heart is open to him, and the opportunity of touching the hearts of others with his stories of a client's wrongs. Here the American bar has one advantage over that of the Continent of Europe though

[1] Cicero, *Oratio pro A. Cæcina*, Cap. XI: "Nor is anything so inimical to law as using force; nor anything so hostile to equity as an assembly of armed men."

not an unmixed one, in our system of trial by jury in both civil and criminal causes. It brings the advocate in close touch with the people. It teaches him psychology, and gives them, after listening to whatever he may say, a direct share in the government of the country.

There was some truth in the sally of Horne Tooke, when on trial in 1788, for refusing to pay the costs of vexatiously contesting the election to the House of Commons of Charles James Fox. "There are three efficient parties engaged in this trial," he declared, in arguing his own cause. "You, gentlemen of the jury, Mr. Fox and myself, and I make no doubt that we shall bring it to a satisfactory conclusion. As for the judge and the crier, they are here to preserve order; we pay them handsomely for their attendance, and in their proper sphere they are of some use; but they are hired as assistants only; they are not and never were intended to be the controllers of our conduct." [1]

More than anything else, trial by jury keeps the art of oratory alive. Cicero said that orators were the smallest class in any community, and rarer than poets. It might almost be said that we should have none in the United States were it not for the triumphs of the bar.

Oratory is the child of feeling. The born orator is a sentimentalist, and every lawyer who wishes to shine as a public speaker must cultivate the faculty of forcibly expressing, on fit occasions, whatever of native sen-

[1] Campbell, *Lives of the Chief Justices,* Boston, 1873, Vol. IV, p. 76.

timent may serve to give life and strength to what he says.

William H. Seward, a day or two after Lincoln had read to him his first inaugural message, said of his chief that he had "a curious vein of sentiment running through his thought, which is his most valuable mental attribute." [1] It was this that gave, two years later, an eternal charm to the Gettysburg oration.

But the oratory that might move a jury may weary a judge. The bar of every appellate court, and of every other court proceeding without a jury, is a training school in the art of concise statement. It involves sifting a controversy down to what is really material, and then sifting the words down in which that is to be presented to the court.

Dean Swift says, in his *Tale of a Tub*, that "the society of writers would quickly be reduced to a very inconsiderable number, if men were put upon making books, with the fatal confinement of delivering nothing beyond what is to the purpose." The satire is half true, but lawyers have the satisfaction of exercising a profession in which such a confinement is the inexorable rule of argumentation for all. A speech to a jury must conform to that, as fully as one made to a judge, although more time and more words may be necessary to impress a thought or proposition upon twelve men than upon one. The aim of argument must be to make the dullest juror understand the line of reasoning which is put forward. But even for juries a lawyer soon learns

[1] *Charles Francis Adams, An Autobiography*, Boston, 1916, p. 96.

the advantages of brevity in speech. To attain it he must spare no pains to emphasize to himself the principal matters to be presented, and to determine how to put them forward in proper order. He must study condensation. Every case that he tries can and should help him to try the next better.

To argue cases with the greatest effect, the speaker must dwell only on the main points. The successful lawyer soon learns this. It makes his success.

John Bright once compared his own methods with Gladstone's, thus: "When I speak I strike across from headland to headland. Mr. Gladstone follows the coast line; and when he comes to a navigable river he is unable to resist the temptation of tracing it to its source."

What a man is determines what he says. No one can rise to the highest ranks of the legal profession who is not honest at heart. One of Carlyle's wise sayings, in *Past and Present*, is this: "How can a man, without clear vision in his heart first of all, have any clear vision in the head. It is impossible."

Be it possible or not with other men, it is certainly impossible for the lawyer. His work is to determine what justice is between man and man. For this he must have a clear notion of the principles of justice. They generally will be found to furnish the standards for judging of his client's claim.

But law is not the science of rights. It is the science of enforceable rights. It teaches the rules of human conduct, which the State deems imperative. Its study is helpful to those who engage in it simply as a

matter of mental and moral discipline. It marks, to a large degree, the limits both of personal and social duty.

Jean Jacques Rousseau has said that "the man and the citizen, whosoever he may be, has no other kind of property to put into society than himself: all his other property is there despite him." [1] But how best does one give himself? Certainly after learning first what he owes, under existing laws. He must pay, before he gives. He can give only what remains after his legal obligations are discharged. Any inquiry as to what those are, in a novel and doubtful case, is an invitation to examine the remotest foundations for their support. A lawyer has an opportunity in this for independent and original research such as seldom comes to those in other professions. It is part of his proper preparation for the formation of an opinion or the argument of a cause, and consequently the time spent upon it is, within reasonable limits, a legitimate subject of charge against his client.

Burke said of law that it is "a science that does more to quicken and invigorate the understanding, than all other kinds of learning put together." But he said also that "it is not apt, except in persons happily born, to open and liberalize the mind exactly in the same proportion." Be this as it may, every lawyer is urged on by powerful considerations of business interest to broaden his views not only by metaphysical studies, but by seeking a wider acquaintance with general literature.

In examining witnesses and dealing with judges and

1 Rousseau, *Emile*, 1772, Vol. II, p. 108.

juries he needs to be a close and quick student of their mental characteristics. He must know more than most men of the course of human conduct in respect to personal rights and wrongs. Reading good novels or poetry is not a bad way of studying psychology and acquiring the ability to put himself in another's place.

Another educative force to a lawyer is his special opportunities to take part in shaping policies of legislation. There are few laws that do not come from a lawyer's pen. There are fewer still that do not owe their enactment to a lawyer's influence. The maker of a legal change feels the dignity of his position. For all men, as Mr. Lecky has observed, there is a strong educational influence in legislation. The lawyers who frame or execute it naturally are the ones to profit by this influence most, and most promptly. It gives them a better appreciation of what law is and what it ought to be. It leads to authorship in a congenial field all the more effective because it is of an unambitious kind. The lawyers have short avenues to the public mind [illegible] magazine articles or newspaper interviews, and many take advantage of them.

"Men whose professional duties would render it impossible for them to write long books, are quite capable of treating philosophical subjects in the form of short essays, and have in fact become conspicuous in these periodicals."

This fact, according to Lecky, tends to promote the spread of utilitarian philosophy, which he deems the basis of legislation.[1]

[1] Lecky, *History of European Morals*, London, Vol. I, p. 131.

As the lawyer may gain cultivation by helping to make law, so he may gain it by opposing the adoption of laws which is urged by others. He can see better than the members of any other class in the community the effects of an ill considered piece of legislation, and there is no American legislature that does not have before it many projects of that kind. The people, to some extent, have a right to rely on the bar to call attention to the objections which they perceive in them.

James C. Carter has thus alluded to this duty and power of the bar in some of these respects:

"Among the evils which oppress society, there are few greater than that caused by legislative expedients undertaken in ignorance of what the true nature and function of law are, and the effective remedy — at least, there is no other — lies in an effort to correct this ignorance by knowledge." [1]

3. *The Opportunities of the Lawyer for Public Service and Social Advancement*

Public service a natural duty. The lawyer is officially always a public servant. The necessity for a legal profession. The lawyer, a speaking statute. His natural opposition to absolute power. His function as an interpreter of laws. His altruistic work, as a public defender. His place in court. His place as a peace-maker. His place as a ruler; and as a framer of legislation. Preventive legislation. The lessening of the lawyer's social influence since de Tocqueville wrote.

Oliver Cromwell, in writing as to the studies which he wished his son to pursue, said that mathematics and

[1] Carter, *Law, its Origin, Growth and Function*, p. 4.

history should be among them, "for such studies may fit him for public services, unto which every man is born." [1]

The lawyer belongs to a profession which has made the most of this birthright, or rather, let us say, of this natural duty. Every member of it, as has been explained in the first section of this chapter, is actually in the public service. He adopts the profession with this in view. He knows that it has been created and privileged, presumably for the public good. A distinguished member of the New Jersey bar (Courtlandt Parker), in an address given in 1881 before the Law School of Columbia University, said that "the motive for the practice of law — the controlling and directing motive — should be a desire of usefulness to our fellowmen, in the capacity of a minister of justice, a manager, and a part of the machinery of civilized society." This machinery is always running. The workshop of the State is open, day and night. The lawyer's part in it is not determined by what he does visibly in the public eye. Coleridge was wrong when, in his *Table Talk*, he declared that law is a profession inferior to the ministry because it is only necessary for some at some times, while the minister's work is addressed to something necessary for all, at all times. It is necessary for all at all times that the forces for good government should be maintained everywhere in full and constant action. The uses and opportunities of the legal profession are

[1] MSS. letter owned by John Forster, *Letters of Charles E. Norton*, Boston, 1913, Vol. I, p. 321.

not to be measured by what it does actively, so much as by what it does passively and unobserved.

It assures the people that an agency of a public character exists which is always near at hand and ready to assure a public remedy for any private wrongs. If in a country like ours there were no lawyers, there would be no safety for business enterprise, and little personal security. In these directions every lawyer is worth ten policemen. He exists to protect the social order. His usefulness to the community therefore reaches far beyond the particular sphere of his professional efforts. It lies primarily, if not mainly, in his being one of a class always standing ready to serve the public in securing the benefits of living under the rule of law.

The good of a policeman is measured less by the number of arrests which he may make, or disorders which he may suppress by his active interference, than by his being within call, upon his beat, ready to intervene for the protection of any legal rights, should need arise. The good of a lawyer lies in what he might do, almost as much as in what he does. The bar, by his presence in it, is or ought to be a better agency for maintaining the interests of justice. He makes the battalions heavier that are readier to act, when those interests are imperiled.

Law moves with irresistible force, but it must first be set in motion by somebody, and by somebody whose business it is to do this.

Cicero quotes as a proverbial saying in his day, that the magistrate is a speaking statute, but a statute is a

silent magistrate.[1] So a statute with us would remain silent, were it not for the courts and for the lawyers who start them going, and see that they do their work despite all impediments.

When Peter the Great made his round of personal observation to ascertain what modern government seemed to be and could accomplish, nothing surprised him more than the numbers and the privileges of the English bar. There were, he told one of his informants, only two lawyers in all Russia, and he proposed to hang them on his return. From his standpoint, that was no bad policy. The lawyer is naturally unfriendly to absolute power. His whole work is conditioned on the existence of a government of laws, rather than of men.

Law is the product and rule of civilization. It may, so far as put in written form, take the shape of an imperial decree, revocable at the imperial will. Where it does, the lawyer's place is a subordinate one. But it is not without large importance there. The decree stands till it is revoked, and can hardly fail, whatever it is, to give occasion for differences of opinion as to its interpretation and effect.

No such form of words will mean exactly the same thing to every man whom it concerns. No kind of written document can. No man can state a proposition which will convey precisely the same impression to every mind. Each man has his own standpoint in the uni-

[1] Cicero, *De Legibus*, Lib. III, Cap. 2. *Vereque dici, magistratum legem esse loquentem; legem autem, mutum magistratum.*

verse, and whatever he sees or hears he measures from that. The interpretation of laws is the most important branch of hermeneutics. It calls for the exercise of careful discrimination, and high analytic power. It follows processes of logic. It requires large historical knowledge. It makes much of reasoning by analogy. It is not only one particular decree or legislative act which must be studied. That decree or statute has relations necessarily to the customary rules of social order, which previously were recognized. What those rules were must be known, before it can be determined whether the new act of the lawgiver has affected their operation, and what was the real mischief that this act was designed to remedy. *Non ex regula jus sumatur, sed ex jure quod est regula fit.*

In civilized countries differences of opinion as to the interpretation and character of laws are commonly decided by the courts. Their advice is seldom asked in advance. It is seldom given in the shape of a public declaration, addressed to any of the political departments or officials. It is made in the course of a law suit between private individuals or between the government and a private individual whom the government is prosecuting. It is not made till all the parties to the action have had a fair opportunity to be heard, on every question involved.

To give such an opportunity the employment of lawyers is almost necessary. A scientific inquiry can only be advantageously pursued by a scientist. The

lawyer, if competent for his office, is a scientist in his work of interpreting and applying the laws.

In free governments, therefore, he is commonly invested with what may fairly be called a public office by virtue of his profession. It entitles him to be heard in behalf of others in the courts before which he practices. No one else can be heard except the parties themselves; and the parties seldom venture to avail themselves of this right. One in that position cannot take in the view-point of the other party, or even of the court and, where he can, he has not had the training which enables him to appreciate what conclusions it involves. The common experience of mankind is expressed by the proverb that he who is his own lawyer has a fool for his client.

The lawyer in court is always speaking for others, less able than he to explain their rights. He is, indeed, a sworn altruist. His oath of office binds him to render his best services, if assigned to that duty by the court, as a public defender of prisoners in the dock, who are without means to employ counsel. He has a knightly profession. Whether paid or unpaid for what he does, he is every day fighting other people's battles.

The Romans did not hesitate to put forward this fighting quality of the lawyer — this fighting for other men — as his great and true title to public regard. As they state it in their Code:[1] "Advocates who decide the doubtful fates of causes and by the strength of their

[1] *Code of Justinian*, Lib. II, Tit. 7.

defense often set up again that which had fallen, and restore that which was weakened, whether in public or in private concerns, protect mankind not less than if they saved country and home by battle and by wounds. For in our warlike empire we confide not in those alone who contend with swords, shields and breastplates, but in advocates also, for those who manage others' causes fight as, confident in the strength of glorious eloquence, they defend the hope and life and children of those in peril."

A Spanish proverb says that he who has heard only one side of a cause, has heard nothing. The existence of lawyers makes it possible and usual for each side to be properly presented before the courts. It is for this reason that the legal profession is singled out as the only private one whose members are *ipso facto* sharers in public office.

Nor are a lawyer's opportunities for daily public service at all to be measured by what he does or says in the trial of contested causes. Many causes are never contested, and this because a lawyer advised that they should not or could not be. A lawyer is largely a peacemaker. Out of every dozen claims, that might be put in suit, which are presented to him for counsel, he will not be apt to advise suing on more than one or two. Lincoln shone as an advocate, but his advice to lawyers was to keep their clients out of court when they could. "Discourage litigation," he said. "Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser

— in fees, expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of becoming a good man. There will always be enough business. Never stir up litigation. A worse man can scarcely be found than one who does this."[1]

A lawyer has a large opportunity to shape the course of others in the conduct of life, and, more than this, to help in shaping that of the whole community.

The positions most strong men love best are those of command; next, those of influence. They may love them because they minister to ambition, but oftener it is from a better motive, and they are sought mainly because of the opportunity they give to do good to other men and to the State.

A lawyer never commands. He always influences. But he is also of a class from which the commanders of society in the United States are always selected. The judges are our real rulers: and only lawyers can aspire to the bench. A seat there often comes to lawyers who have earned the favorable regard of the bar, and to few who have not. A man's ability in any art is best understood by his fellow craftsmen in the same art.

To go from the bar to the bench brings a change of attitude towards the law which most men find agreeable. They have been accustomed to try to bring causes within it; it is now for them to say what its doctrines and limits are, and how they shall be applied. Lord Tenterden, soon after he was appointed a Judge

[1] Hill, *Lincoln the Lawyer*, p. 102.

of the Court of Common Pleas, wrote to a friend that he found the search after truth much more pleasant than the search after arguments.

Lawyers also fill most of the higher offices in the States and the United States. They draft most of the laws. They are generally found at the head of the political departments. They are prominent in constitutional conventions. Of the fifty-six signers of the Declaration of Independence, twenty-five were lawyers; of the fifty-five members of the Convention which framed the Constitution of the United States, thirty were. Of the Presidents of the United States, twenty-one out of twenty-six have belonged to this profession: so have a large majority of the senators of the United States, and about half of the representatives in Congress.[1] In the State governments the same thing is true of the principal officials.

Theodore Roosevelt once said that "no people have permanently amounted to anything whose only public leaders were clerks, politicians and lawyers." One of the best known members of the American bar replied to this with perfect truth that "no people have ever permanently amounted to anything among whose leaders great lawyers were not conspicuous, and among whom respect for the law was not a controlling force."

Napoleon, when he desired to shape the law according to his own will and keep France from freedom, began the nineteenth century with setting up a privilege on

[1] Benton, *Annual Address* in 1894 before the New Hampshire State Bar Association, p. 247.

the part of the government to have jurisdiction over causes affecting it or its officials, taken from the ordinary courts, and given to special tribunals confined to that sort of business. It kept the French bar back from one of the largest opportunities of public service.[1]

Lawyers, both as such, and as legislators, are, as has been said above, often the framers of statutory law. Nothing of human make has a higher place than belongs to that. It is no easy task to devise a statute that will remedy one evil without causing another. What qualities it ought to have are well depicted by one of the older Spanish writers on law, Isadore of Seville. A good statute, he says, will be honorable; just; practicable; in accord with nature; in accord with the custom of the country; in place and time convenient; necessary; useful; plain also that it contain nothing through obscurity which is fallacious; written for no private interest, but for the common advantage of the people.[2] Few laws will answer all these conditions, but it ought to be a lawyer's ambition, and certainly always is his opportunity, to let no draft of a statute pass from his hands which does not approximate to this lofty

[1] Dicey, *Law of the Constitution*, 8th ed., p. 232.

[2] "*Erit lex honesta, justa, possibilis, secundum naturam, secundum patriae consuetudinem, loco temporique conveniens, necessaria, utilis, manifesta quoque ne aliquid per obscuritatem in captionem contineat, nullo privato commodo sed pro communi civium utilitate scripta.*" Cited by Bruncken, *American Political Science Review*, Vol. VIII, p. 224, n.

standard. There will never be a time when the people will not welcome such laws as conform to it.

This is particularly true of new statutes which help courts to exercise more freely their preventive powers. To keep men from injuring others is a much more effective way of maintaining the social order than to wait till the act is done, and then concern oneself only with questions of reparation or punishment.

Much here remains to be accomplished by the American lawyer. As has been well said by Professor Pomeroy:

"The ideal remedy in any perfect system of administering justice would be that which absolutely precludes the commission of a wrong; not that which awards punishment or satisfaction for a wrong after it is committed." [1]

De Tocqueville, in his *Democracy in America*,[2] struck by the fact that the members of the American bar ranked particularly high in the social scale, gave most of a chapter to the discussion of the causes. From this a few passages merit quotation here:

"In visiting the Americans and in studying their laws, we perceive that the authority they have intrusted to members of the legal profession, and the influence which these individuals exercise in the government, is the most powerful existing security against the excesses of democracy. . . .

"In all free governments, of whatever form they may be, members of the legal profession will be found at the head of all parties. The same remark is also applicable

[1] Pomeroy, *Equity Jurisprudence*, San Francisco, 1907, Sec. 1357.

[2] Vol. I, Reeves' translation, ed. of 1841, p. 297, *et seq.*

to the aristocracy; for almost all the democratic convulsions which have agitated the world have been directed by nobles.

"A privileged body can never satisfy the ambition of all its members; it has always more talents and more passions than it can find places to content and to employ; so that a considerable number of individuals are usually to be met with, who are inclined to attack those very privileges, which they find impossible to turn to their own account.

. . . . . .

"The people in democratic states does not mistrust the members of the legal profession, because it is well known that they are interested in serving the popular cause; and it listens to them without irritation, because it does not attribute to them any sinister designs. The object of lawyers is not, indeed, to overthrow the institutions of democracy, but they constantly endeavor to give it an impulse which diverts it from its real tendency, by means which are foreign to its nature. Lawyers belong to the people by birth and interest, to the aristocracy by habit and by taste, and they may be looked upon as the natural bond and connecting link of the two great classes of society.

. . . . . .

"If I were asked where I place the American aristocracy, I should reply without hesitation, that it is not composed of the rich, who are united together by no common tie, but that it occupies the judicial bench and the bar."

The half century which followed the publication of *Democracy in America*, as Lord Bryce has remarked, reduced the weight of the American bar "as a guiding and restraining power, tempering the crudity or haste of democracy by its attachment to rule and precedent." [1]

Lawyers have also receded, relatively, in social posi-

[1] Bryce, *American Commonwealth*, Vol. II, 1st ed., London, 1888, p. 490.

tion. There are no longer but three professions — theology, law, and medicine. The "captains of industry" have won high place. Great fortunes, many of them coming as a reward of scientific discoveries, have given new means of social distinction. The higher education is shared in by more. In the country and the small towns, the lawyers retain their original place: in the great cities they are less frequently the leaders in social circles than in the time of de Tocqueville.

But in the capacity to render social service they still hold their own; and social service is more and more becoming the best expression of public service.

4. *The Opportunities of the Lawyer for Making Money*

The bar overcrowded, and always has been, both in England and the United States. Incomes of leading American lawyers. Of leading English ones. Large single fees. Contingent fees. No partnerships of English barristers. The briefless barrister. Entering the American bar, with no funds to draw on. Rich young lawyers, not favorites with clients. Bad debts. The prizes of the profession. Social changes tending to affect lawyers' fees. Those of the country lawyer. Legal Aid societies. Collection agencies. Insurance against accident claims. Examination of land records. The Torrens plan. Title guarantee companies. Advertising for business.

A lawyer engages in a profession which, both in England and the United States, is overcrowded. Every calling will be which possesses high attractions. The supply will always exceed the demand. One of the attractions of the law is that it offers to those of suitable qualifications who enter it after a proper preparation, a reasonable chance of obtaining a large income and the

probability of earning an honorable livelihood. Complaints that there are too many lawyers appear early and constantly in English history. Chief Justice Fortescue, writing in the fifteenth century, says that there were then two thousand students in the Inns of Court and Chancery. If we add together the barristers and the solicitors there are now in England something like one for every 1,100 of the population. In the United States the proportion is about one to 700.[1]

Of the ten or twelve thousand[2] of titular English barristers, less than three thousand were named in the "Law list" of 1909, and not more than about two thousand have made any substantial effort to practice their profession. A large part of them studied for the bar simply as a mode of preparation for a life of good citizenship, or for what it might bring of social position.

As soon as the American colonies began to assume the position of important industrial communities, they were well supplied with both barristers and attorneys from England, and a little later an American bar was developed, a few of them having gone abroad to learn their profession in the inns of court, but most studying, if at all, in lawyers' offices here, whereby they obtained but a very imperfect view of legal science. Instruction in law was not given in our colleges and universities until towards the closing quarter of the eighteenth century.

[1] Carter, *Ethics of the Legal Profession*, p. 19.

[2] In 1866 there were but 4,800. Jeaffreson, *A Book about Lawyers*, London, 1867, p. 273.

In the seventeenth, the overcrowding of the bar, and the indifferent preparation generally made for it, occasioned some restrictive legislation in the older colonies.[1]

In 1758, John Adams tells us that the Boston bar was overflowing, and in 1766 he writes this in his diary: "Every county of the Province swarms with pupils and students and young practitioners of law. The thought of no business mortifies, stings me." [2] His son, the second President Adams, found himself in the same situation and from the same cause, when he commenced practice in Boston in 1791.

Jeremiah Mason, in his autobiography, tells us that in 1788 "the State of Connecticut was overstocked with lawyers: most of them had little business, with fees and compensation miserably small. The professional income of Pierpont Edwards, supposed to be the largest in the State, was said not to amount to two thousand dollars a year. Very few obtained half that sum." [3] The Connecticut bar was also considered as much too large in 1823.[4]

In 1782 the bar of the Colony of New York was thought to contain too large a number, though there were only sixteen of them. Most of the business of that day was carried on south of New York. Luther Martin of Maryland had been making £1,000 a year, at

[1] *Early Courts and Lawyers,* Yale Law Journal, Vol. X, p. 384.

[2] *Life and Works of John Adams,* Boston, 1830–56, Vol. II, pp. 63, 200.

[3] *Memoirs of Jeremiah Mason,* Cambridge, 1873, p. 17.

[4] Beers, *Biography of Roger Minott Sherman,* p. 31.

the outbreak of the Revolution.[1] John Marshall, in 1795, earned $4,500, which was more than came to any other Virginia lawyer. Alexander Hamilton of New York City, during the first decade of the next century, had a professional income of from twelve to fourteen thousand dollars a year. Receiving one day a letter inclosing $1,000, as a general retainer, he returned it "as being for more than is proper."[2] In 1816, William Pinckney of Maryland earned $21,000.[3]

The first lawyer in New England to gain a practice of $10,000 a year was probably Theophilus Parsons of Boston. This he had in 1806, when appointed Chief Justice of Massachusetts.[4] A few years later (1811), Joseph Story of Salem had a practice of five to six thousand dollars when he went upon the bench of the Supreme Court of the United States.[5] Lemuel Shaw of Boston had been making from fifteen to twenty thousand dollars a year when in 1830 he became Chief Justice of Massachusetts.[6] In 1821, Reverdy Johnson of Baltimore made between ten and eleven thousand dollars.[7] Daniel Webster earned $13,000 in 1834, $15,000 in 1835, and $22,000 in 1836; but in these sums are included his salary as a Senator of the United States. The largest single fee he ever received was

1 *Great American Lawyers,* Philadelphia, 1907–9, Vol. II, p. 7.
2 *Life and Works of Alexander Hamilton,* Vol. II, pp. 189, 190.
3 *Great American Lawyers,* Vol. III, p. 138.
4 *Ibid.,* p. 138.
5 *Ibid.,* p. 138.
6 *Ibid.,* p. 467.
7 *Id.,* Vol. IV, p. 414.

$7,500.[1] Benjamin R. Curtis of Boston, in 1857, the year after he left his seat in the Supreme Court of the United States, earned $38,000 from his profession.[2] No other American lawyer before the war probably had a settled practice of that magnitude. The first in Connecticut to earn one of $10,000, net, was Roger S. Baldwin, in 1862.[3] The writer was told by a leading lawyer of New York City in 1880 that there were not then seventy men at the bar of that city, who were earning as much. A few were earning much more. William M. Evarts was currently credited with a steady income of $75,000. Roscoe Conkling who, after leaving the Senate in 1881, settled in New York City, is reputed to have made close to $100,000 a year for six years. Lord Bryce, after considerable inquiry, came to the conclusion in 1888, that " possibly not more than fifteen counsel in the whole country make by their profession more than $50,000 a year.[4]

A successful lawyer's fees in great cases are generally overestimated. It was repeatedly said that Joseph H. Choate of New York received $250,000 for arguing the Income Tax cases twice before the Supreme Court of the United States. In fact the sum was $34,000.[5]

No incomes of English barristers have ever been as large as the largest in the United States. The fact that

1 Harvey, *Reminiscences of Daniel Webster,* Boston, 1877, p. 35.
2 *Great American Lawyers,* Vol. V, p. 450.
3 *Great American Lawyers,* Vol. III, p. 525.
4 Bryce, *American Commonwealth,* 1st ed., Vol. II, p. 490.
5 Strong, *Life of Joseph H. Choate,* New York, 1917, p. 232.

there are at least two lawyers to be paid for the trial of every case, the barrister, and the solicitor who employs him, keeps down the charge of each. There is also a traditionary sentiment in the English bar, that law should not be regarded as a mercenary art.

This has served to keep the *minimum* retaining fee very low. In 1738 a duchess sent to William Murray, afterwards Lord Mansfield, a general retaining fee of a thousand guineas. He returned a check for nine hundred and ninety-five, with a note saying that the established fee was neither more nor less than five guineas.[1] An English barrister stated in a public address, in 1910, that there were not fifty men of his profession in the whole kingdom who earned a steady net income of £1,000.

Sir Edward Coke in one year took in £7,000. John Scott, afterwards Lord Eldon, earned the same amount in 1787.[2]

Lord Erskine, perhaps the most famous of English advocates, never made more than £10,000 a year. Charles Abbott, afterwards Lord Tenterden, during 1807, took in £8,000. Probably these sums, if they are to be understood as net, and represent a regular average of annual professional receipts, had not then been exceeded in England.

Judah P. Benjamin, who became a member of the English bar, after the collapse of the Southern Confederacy, had a gross income, in 1880, of nearly £16,000

[1] Jeaffreson, *A Book about Lawyers*, London, 1867, p. 191.
[2] *Ibid.*, p. 117.

and, during the sixteen years of active practice in London had gross receipts aggregating £144,000.

Barristers in England, however, pay their clerks by a commission on their fees. As they are the go-betweens who bring briefs from attorneys, this percentage may amount to a large sum, to be charged against income account. That coming to Mr. Benjamin's chief clerk in one year was £1,200.[1]

No lawyer in England of his time, probably, received larger fees than Mr. Benjamin collected in his best year, and it is doubtful if a greater sum has been received by any since.[2]

Both there and here very large fees are occasionally received for services in suits or in corporate promotions and reorganizations, which make a red letter year in the lawyer's life. It is said that $500,000 was thus paid, not many years ago, to a Chicago lawyer. Payments of this character are often, in fact, made in corporate securities of uncertain value.

In 1875, Sergeant Ballantine received one fee of ten thousand guineas.[3] Probably the largest fee ever before received in England for the trial of a single cause, was that of Thomas Wilde (afterwards Lord Chancellor Truro), who had nine thousand guineas for going "special," i. e. out of his circuit, in a suit involving very large property interests.[4]

[1] Butler, *Judah P. Benjamin,* Philadelphia, 1906, p. 420.

[2] See Bryce, *American Commonwealth,* Vol. II, 1st ed., p. 490.

[3] Crispe, *Reminiscences of a King's Counsel,* London, 1909, p. 130.

[4] Sheil, *Sketches of the Irish Bar,* New York, 1854, Vol. I, p. 19.

Large claims are, in most of the United States, often put in suit by lawyers on an agreement by which, in case of success, they are to receive a fixed and considerable percentage of the proceeds. Where this is unaccompanied by a promise to pay the costs of the proceeding, it is generally considered as not objectionable. The Code of Legal Ethics of the American Bar Association sanctions such arrangements, but with the proviso that they should be in each case under the supervision of the court.[1]

This practice is most common in respect to claims against the government, actions for injuries received from accidents, suits to settle disputes as to land titles, proceedings for taking property for public use, and contested wills. If it did not exist, the rights of the poor man would often be seriously jeopardized. Alexander Hamilton made an agreement for additional fees in case of success, at a time when his practice was at its height.[2]

An American lawyer has a chance of losing money which does not exist as to the English barrister. He is liable in damages to his clients for neglect of duty. The relation to him is not regarded as purely an honorary one. As in the United States the lawyer may sue for fees, it is fair that the client should be allowed to sue him, if he has not taken proper care of the business that he was employed to do.[3]

[1] *Reports of the American Bar Association,* Vol. XXXIV, p. 1163.

[2] A. M. Hamilton, *Life of Alexander Hamilton,* New York, 1910, Vol. II, p. 190.

[3] Bryce, *American Commonwealth,* Vol. II, 1st ed., pp. 483, 485.

It is another incident of the uncommercial character of an English barrister's employment that he cannot form a legal partnership. This denies him a means of working into practice which often opens the door to an American lawyer's early success.

An English barrister has declared that the legal profession is the best of all to a man in good circumstances, with the proper qualifications. "As a profession," he writes, "the Bar, to my mind, is the most delightful of all avocations. Given a man who knows his law, is a fair logician, a fluent speaker, who can hold his own in argument, who has a knowledge of human nature, who can weigh the metal of juries and plumb the depths of witnesses, who possesses good-humor, intelligence and tact, who has some grace of style, a spice of wit, and who can wreathe the garlands of rhetoric — I can imagine no man occupying a more enviable position. He has fortune, promotion, and possibly rank before him. The choicest prizes the Crown offers may be won; he may even have to keep the King's conscience. If he is ambitious he finds the widest fields to delve. If he is popular — Society welcomes him. Playwrights and novelists idealize him. The Senate is open to him, and if his dip into the political lucky-bag is successful he becomes that for which his training has well fitted him — a maker of laws. . . .

"But," he proceeds, "I strongly advise a man who is in needy circumstances not to join the Bar; if he does he is inviting a life of grave anxiety." [1]

[1] Crispe, *Reminiscences of a K. C.*, pp. 198, 200.

The American lawyer without independent means of support is in a somewhat less embarrassing situation. He is not obliged by social custom to live at as expensive a rate. He can make up for the want of professional business, or supplement what he may have, by doing something else, such as tutoring, or soliciting insurance, or working on a newspaper. He does not fall as far, if he finds himself obliged to abandon the profession altogether and follow some humbler employment.

The want of money, however, is a stimulant to most men to work harder for success, than they otherwise might. Clients, moreover, are less likely to come to a rich man or a rich man's son than to one who is known to need business, who has every motive to do his best, and who would naturally be inclined to make more moderate charges. Charles Francis Adams (second of the name) writes in his autobiography that after entering the bar he sat years in an office in a building in Boston, owned by his father, without a call from a single *bona fide* client. There was money in his family; and everybody was aware of it. Hence they passed him by for poorer men. His brother Henry came under the same shadow, for the same cause.[1]

An English judge has said that most barristers who achieved success, achieved it because they began without a shilling.

Curran, the great Irish advocate, received no fees of importance until he had been quite a while at the bar.

[1] *The Education of Henry Adams*, Boston, 1918, pp. 240, 242.

The first came at a moment when it was indeed a God-send. He tells the story thus:

"I then lived upon Hay Hill; my wife and children were the chief furniture of my apartments; and as to my rent, it stood pretty much the same chance of liquidation with the national debt. Mrs. Curran, however, was a barrister's lady, and what she wanted in wealth she was well determined should be supplied by dignity. The landlady, on the other hand, had no idea of any gradation except that of pounds, shillings, and pence. I walked out one morning to avoid the perpetual altercations on the subject, with my mind, you may imagine, in no very enviable temperament. I fell into the gloom to which, from my infancy, I had been occasionally subject. I had a family for whom I had no dinner, and a landlady for whom I had no rent. I had gone abroad in despondence — I returned home almost in desperation. When I opened the door of my study, where Lavater alone could have found a library, the first object which presented itself was an immense folio of a brief, twenty golden guineas wrapped up beside it, and the name of Old Bob Lyons marked upon the back of it. I paid my landlady — bought a good dinner — gave Bob Lyons a share of it — and that dinner was the date of my prosperity." [1]

Many an American lawyer has been harassed by similar anxieties, and not all have escaped from them so well. To all, business that is substantial is apt to come slowly. For the time thus left on a young lawyer's hands, however, there is opportunity for good use. He ought to employ it in legal study, and in watching proceedings in court. He needs to pay attention to these

[1] Phillips, *Curran and His Contemporaries*, New York, 1851, p. 50.

things at just that period of his life in order to lay the foundations for a successful practice that may be later within his reach. It is almost a misfortune to a young lawyer to have much business during his first years at the bar. If quick success comes to him, it is apt to give way after a few years to permanent failure.

It is, also, always true that an American lawyer's business is (and particularly at the outset) conducted on the credit system. Work that he does to-day is seldom paid for to-day, or to-morrow. It may be years before the account is squared. Many never are. Every lawyer knows from experience what " bad debts " are.

On the other hand, a lawyer's want of success does not involve others in his embarrassments as do failures in other occupations. What was known forty years ago as the " Boston mercantile maxim " declared that sooner or later, ninety-seven merchants in every hundred become insolvent. This was probably an over-estimate. Certainly it is such now, in view of the reduction during the life of the last generation in the number of distinct mercantile concerns, incident to the growth of large corporations. But no such result was ever predicted as to the lawyers of the country. Most of them succeed in making a comfortable living. Nor, if they fail to achieve this, does their ill-fortune often affect any large number of creditors.

Sydney Smith once said that the reason why so many men took orders in the Church of England, when they could hardly be certain of getting a curacy of forty

pounds a year, was that they might become deans and bishops. So the law, both in England and the United States, attracts many who hope for high place and large incomes, but to whom they never come.

The American bar is no doubt too crowded for its own best good. Probably it always has been. By the Census of 1910 it numbered over 120,000. In 1880 there were less than 65,000. The increase, however, was fairly proportioned to the addition to the population of the country during the period. Since 1910, the number of law students has fallen off relatively to the growth of population. This is mainly due to the general advance in all the States of the requirements for admission to the bar, on account of the efforts of the American Bar Association. It will, of course, tend to increase the average earnings of the American lawyer. But the attractions of the bar will probably always keep it, here, too full. The nature of American government makes it particularly attractive. The genius of the people is bent towards reliance on and respect for law, except in case of recent immigrants from countries where the powers of society have been used for oppression. As long ago as 1775, Burke remarked upon this as a dominant American characteristic. Our spirit of liberty, he said in the House of Commons, was fed by our subjects of education. Law had a large place. The lawyers were at the front.

"The profession itself is numerous and powerful; and in most provinces it takes the lead. The greater number of the deputies sent to the congress were lawyers. But all

who read, and most do read, endeavor to obtain some smattering in that science. I have been told by an eminent bookseller, that in no branch of his business, after tracts of popular devotion, were so many books as those on the law exported to the plantations. The colonists have now fallen into the way of printing them for their own use. I hear that they have sold nearly as many of *Blackstone's Commentaries* in America as in England. General Gage marks out this disposition very particularly in a letter on your table. He states that all the people in his government are lawyers, or smatterers in law; and that in Boston they have been enabled, by successful chicane, wholly to evade many parts of one of your capital penal constitutions." [1]

While this trend of thought still maintains a large influence with the more intelligent part of the community, new inventions and scientific discoveries, bringing new industries, and foreign immigration and trade, bringing new ideas, have presented competing subjects of interest and inquiry. They feed the lawyer's business, but have reduced his personal importance. The modern tendencies towards combinations of capital and concentration of efficiency have also had their effect in keeping professional fees in the country at large at a moderate level.

The incomes of the leaders of the bar among country lawyers will naturally be far below those of the leaders of the bar in great cities. At a time, for instance, when some Boston lawyers were making twenty or thirty thousand dollars a year, few of the foremost men at

[1] *Works of Edmund Burke*, Bohn's ed., Vol. I, p. 467.

the bar in the small cities of Massachusetts were earning more than a tenth of those amounts.[1] The office expenses, however, of a city lawyer are greater in proportion to his gross income than are those of a country lawyer. Rents are far higher, and the whole equipment on a more expensive scale. One or two stenographers and office boys may be thought necessary, when the same business in a country town could readily be done with the aid of a typewriter, operated by the lawyer himself. Many reports of large professional incomes give a false impression, because they are understood to refer to net earnings, when they really refer to gross earnings.

Employers' Liability Acts have withdrawn no inconsiderable part of the practice of most American trial lawyers.

In many cities Legal Aid societies supply professional counsel in small matters free, and serve to reduce the number of paying clients. This, however, does not justify the organization of any society or corporation to do legal business for pay. Such an association cannot be a lawyer, nor can it act as one indirectly by employing a lawyer to give professional advice to third parties for a compensation to be paid to it or to him for it.[2]

A corporation may, however, be formed, to insure others against loss from the enforcement of claims of a

[1] Torrey, *A Lawyer's Recollections,* Boston, 1910, p. 82.

[2] *In re* Co-operative Law Company, 198 *N. Y. Reports,* p. 479; 92 *Northeastern Reporter,* p. 15.

certain kind, and do this by assuming the charge of defending against any suits brought to enforce them. Here the defense is, of course, to be made by lawyers, acting under all the professional responsibilities attaching to them, as such. The lawyer may be retained by the corporation specially for a single case or regularly by the year for all cases in which it may be concerned. His nominal client in each will be the party sued, but the substantial defendant will be the corporation. Many lawyers derive a large part of their income, and some all of it, from employment of this character. In this way the defense of accident cases has very largely passed into the hands of corporations, organized to insure those who may be responsible for paying the judgment. An employer, thus insured, does not personally retain a lawyer. The company provides one, at its own expense, and probably one especially familiar with the work of handling claims of that description.

Railroad corporations commonly employ claim agents to investigate the causes of accidents, immediately after they occur, and endeavor to secure favorable terms of settlement.

It was estimated by a competent observer, in 1914, that the defense of four-fifths of all the negligence cases arising in or about the larger cities, has come into the hands of a few accident and employers' liability insurance companies.[1]

Until about 1870, lawyers in general practice were

[1] Strong, *Landmarks of a Lawyer's Life Time*, New York, 1914, p. 353.

accustomed to examine the land records and certify to title, and a substantial part of their income came from this source. Since that time, incorporated title and title insurance companies have come, in the larger cities, to do most of this work, and the amount of it has been also lessened by legislative changes.

There are two modes of recording the state of land titles. One is to record at length the documents on which they rest. The other is to record simply the legal effects of such documents. The former was originally the universal American method. The latter (the Torrens plan) has now, in some States, partly supplanted it, and in so doing has transferred there to public officials a business previously belonging to lawyers. The lawyer who certified to the goodness of a title formerly guaranteed to his employer only that he had used reasonable care to ascertain all the facts appearing on record, and proper professional skill in applying the law to them. The title guarantee company pledges itself to indemnify those who take a title which it approves, against any consequent loss, or perhaps against any within certain expressed limitations. The corporation hires title examiners, who are usually lawyers, but each receives only a meager salary, the real profits going to their employer.

In the thinly settled parts of the country the lawyer still retains most of this kind of business, but even there, on a transfer of a particularly valuable piece of real estate, resort is often had to a title company in some neighboring city.

The effect of one modern invention has been to increase largely every lawyer's earning capacity. The telephone practically doubles his working time. He can now safely make engagements on the same day in distant places and keep himself informed of the probability of reaching a case for trial without going to the court house until told, from the clerk's office, that it is necessary.

Business is secured in many callings by advertising in newspapers and magazines. Special qualifications for doing it well may be set out at length. This, like any other form of soliciting employment, is denied to lawyers.[1] Each of them must win a place on his merits, as other people view them, not as he may describe them, himself. This may seem a hard rule to lay down for a man entering the bar, and whose legal ability has therefore never been tested. He must wait for his opportunity, and make the most of it when it comes. To a lawyer who has once acquired a fair practice, his reputation is his standing advertisement. In the United States and Canada it is generally thought not improper for a lawyer to advertise that he pursues a particular line of business, such as suits on patents, or that his office is at a place named. The best lawyers, however, seldom do even this. They do not need the business which it would bring. For a lawyer to advertise implies that he does need it.[2]

[1] *Code of Legal Ethics. American Bar Association Reports,* Vol. XXXIV, p. 1167.

[2] See Carter, *The Ethics of the Legal Profession,* Chicago, 1915, p. 59.

5. *The Spirit of Brotherhood in the Bar*

The bar always a public fraternity. No different schools, in law. Associations within the bar. Use of the term "Brother" in referring to a brother lawyer.

One of the dearest relationships in life is that of brethren. That of members of a great fraternity approaches it in force and meaning. Whoever enters the bar becomes part of a recognized brotherhood. It is one constituted by authority of the State for public purposes and composed of men selected for their proficiency in the science which supports the State, that is, the Law. Most fraternities are private affairs, formed to serve the pleasures or the interests of their members. That of the bar is held together by a public bond and for the public good. As such it has been given a monopoly of the business of addressing courts. It is an undivided monopoly. There are different sects in theology; different schools in medicine; absolute unity in law. Those who practice it are brothers, standing on equal ground. They constitute a body of believers in the same thing. The law which they profess is always in principle one and the same. It stands for justice and it generally is justice.

The bar carries to all its members the obligation of fraternity. It is entitled to their loyal support, each acting for the benefit of all, and never forgetting what is due to the traditional *esprit du corps.*

Alexander Hamilton once refused a retainer in an important case, because it was offered by a man who had made unfair criticisms of the legal profession, in a letter

to a third person. This letter, he wrote, "contains a general and, of course, an unjustifiable reflection on the profession to which I belong, and of a nature to put it out of my power to render you any service in the line of that profession." [1]

It is in this spirit that lawyers should be jealous of the honor of the brotherhood to which they belong. They should, and in some measure they all must find in it an inspiration to the formation of their ideals of law and of the justice on which law rests, and for securing which it exists.

They find in the bar, also, a warning that they must demean themselves worthily in all that relates to it, and that there is power in courts to see that this is done.

They find in it a friendly tribunal to judge their own qualifications for the profession. A lawyer who has won the good opinion of the bar is reasonably certain of success.

In the lighter incidents of daily life, the bar offers opportunities which often lead to intimate and life-long friendships. Particularly is this true in country districts where, when courts are in session, the lawyers from the whole country are thrown closely together. Membership in bar associations, local, State, and national, serves a similar purpose. The American Bar Association, which numbers about ten thousand, coming from every State and Territory, has offered, since 1878, a common meeting place, and maintains a healthy and

[1] A. M. Hamilton, *Life of Alexander Hamilton*, Vol. II, p. 169.

unifying influence over all the local and State associations.

It was for centuries the practice of the English judges to address sergeants-at-law as "Brother" so and so. This usage was extended in the older American colonies to include all barristers, and when that title was dropped in the United States,[1] all counselors at law. Both in and out of court the judges frequently address each other as Brothers, and members of the bar, in conversing with or referring to each other, often use the same appellation. In the case of counsel appearing before the Supreme Court of the United States, those who come from States where this practice obtains, are accustomed to follow it there.

6. *The Variety of Legal Business*

The different classes of lawyers in the United States. Court and office lawyers. Lawyers as trustees. Probate and bankruptcy practice. Practice before public boards or commissions, and in the collection of claims against Governments. New statutes continually raise new questions. The world-war has raised many. International Arbitration. Trial lawyers not necessarily the highest type of lawyers. The lawyer's choice of his class. His change of choice.

In an address given in 1916 to the Seniors in Yale College, President Hadley said:

"Speaking broadly, men may be divided into three types or temperaments: the scientific type, consisting of men whose power lies in observing and arranging and putting facts in order; the literary type, whose interest lies in

[1] In Massachusetts the title of barrister was retained until 1806. *Great American Lawyers*, Vol. II, p. 79.

communicating ideas to others, and in thus influencing the opinions and actions of their fellow men, and the practical type, which is interested neither in the arrangement of facts nor in the communication of ideas, except as a means of achieving concrete results in the way of business or politics or some form of human endeavor. From the first type come our physicians, our engineers, our accountants, and our consulting experts of every kind. From the second type come our teachers, our preachers, our journalists, and our jury lawyers; from the third our merchants, our manufacturers, our railroad men, and our consulting lawyers. The mental qualities which fit a man for success in these three groups are quite different; but those that fit a man for success in the different callings within any one of these groups are pretty nearly the same." [1]

The two groups of lawyers thus described are by no means the only ones to be noticed in the legal profession. Another group is that of the court lawyers who seldom or never try a case before a jury; another of those who practice mainly in the courts of criminal jurisdiction. A large one is of clerks in large offices who work for other lawyers, and receive fixed salaries. Another is of specialists, who pursue some single line of practice, such as patent litigation or admiralty proceedings. Another is composed of men especially familiar with international private law; another of those who particularly profess public international law. Another group consists of teachers of law, some giving all and more but a part of their time to this.

In these and other ways the American lawyer has a

[1] *Yale Alumni Weekly*, Vol. XXV, p. 699.

freedom and range of activity quite unknown to his English brethren. He is more independent and self-contained. Unlike the English solicitor, he can address the court. Unlike the English barrister, he can consult with his clients, and his business commonly comes to him directly from their hands. In England, on the other hand, the barrister's income finds its sources in the good opinion or the favor of the solicitors.[1]

The American lawyer thus combines the functions of the English barrister and solicitor, the advocate and proctor in admiralty, and the French *avocat* and *avoué*. He has the right to engage in the preparation of cases and also in their argument. He can draw the pleadings, and then explain the issues to the court. He can appear in the courts of the United States, as well as of his State. He can attack or defend a patented invention, or a literary copyright, as well as sue on a promissory note.

But practically he is apt to confine his activities mainly to a certain line of practice. He may be chiefly employed either as a trial lawyer, or as an office lawyer. The trial lawyer may be best known for his connection with criminal causes, or in civil causes; for his success before the jury, or before a judge. The office lawyer may seldom or never enter the court room. His time may be devoted to advising this or that action on the part of clients in a case where they are uncertain as to their legal rights. He may be largely a draftsman of

[1] See Jenks, *Short History of the English Law*, Boston, 1912, p. 203.

contracts or conveyances and wills. He may give himself wholly to questions incident to the management of one or more large interests.

A lawyer often also drifts into the position of a trustee of an estate, or of an adviser as to the conduct of a trust. Most of those to whose care the estates of the dead are committed are not lawyers, and need frequent counsel from a lawyer. The division of law known as Equity is specially conversant with trusts of different kinds. Some lawyers give their attention particularly to equitable rules of practice; and partly for that reason are selected themselves as executors, administrators, or receivers, or trustees. Those for whom they may thus act have a special security by reason of the control which courts of equitable jurisdiction have over lawyers, in summary proceedings. Because, if a lawyer is made a trustee, it is probably in part due to his professional character, the court may deal with such a one, should he become a defaulter, as a lawyer who has violated his official obligations to the State. They can enforce restitution by summary proceedings of arrest, or require it, after proper censure, on pain of disbarment.

Practice in the courts of probate and insolvency engages the attention of some city lawyers almost exclusively. A lawyer, as above stated, is often named as executor, or assignee in bankruptcy or insolvency, and such a position is apt to involve or indirectly lead to considerable remunerative labor of a professional character.

The courts of probate, under the laws of mortality, make a turnover, two or three times in every century, of the whole capital in the country, held in private ownership. They also share with courts of equity a large, standing, and continuous jurisdiction over permanent testamentary trusts of a public or charitable nature. Their functions in settling the rights of the State to exact inheritance taxes are of large importance.

Few considerable estates are settled without more than one occasion arising which calls for legal advice, and may result in important litigation, either in these courts or, on appeal, in the higher courts of general jurisdiction. To give but a single instance, the Probate Court of Cook County, which includes Chicago, annually disposes of over ten thousand claims against estates, about a tenth of which are contested. It speaks well for the composition of the court that there are seldom more than twenty or thirty appeals taken.[1]

The great extension since 1866 in the exercise by Congress and the State legislatures of powers previously lying dormant has created almost a new division of practice: — that before public boards and commissions or commissioners. They deal with large interests, and lawyers of the first rank often appear before them. They also often have counsel of their own.

There have always been, in our larger cities, lawyers practicing mainly in the Courts of the United States. Another group, centering at Washington, consists of

[1] *Michigan Law Review*, Vol. XIII, p. 670.

men who spend most of their time in pressing claims against our own or foreign governments.

The excessive mass of American legislation is the mother of innumerable questions of statutory construction. New problems daily arise from it, which call for new studies in new directions.

The litigation in new fields which is sure to follow the return of peace after the world war of 1914–1919 will be enormous. The courts will be kept busy in dealing with great questions of constitutional law. International law, both public and private, will present grave problems for judicial settlement. So will the rules to govern our Courts of Admiralty. The United States also has assumed a new financial character. It is, at the present time, the monetary center of the world. Many commercial disputes of a kind that formerly would have been determined by foreign courts will now be brought before those of our country, both State and National.

Arbitration, commissions of inquiry, quasi-judicial, and judicial proceedings to adjust the differences of nations will become more common than before the war. The methods of conducting them will be revised, and it will be for the lawyers to do this.

The Permanent Court of Arbitration, organized under the Conventions adopted at the Hague Peace Conferences of 1899 and 1907, opened a new forum for the settlement of disputes between independent governments. All the great Powers and several of the

lesser ones have from time to time gone before it for that purpose. They have been represented there by lawyers; and the tribunal which heard them was mainly composed of lawyers. There have been, also, since the close of the eighteenth century, many arbitration proceedings under special treaties. There will, in natural course, be many more. A League of Nations, if effectively organized, will have agencies of a character more or less judicial, either instituted by itself, or taken over by adoption from those created by the Hague Conventions, or by later treaties, or international covenants.

The great American lawyers of the last generation, such as William M. Evarts, Edward J. Phelps, and Benjamin Harrison, have appeared and won new distinction before such tribunals. The set of the tide is towards arbitration or judicial action rather than war, as the mode of settling differences between nations. This, in connection with the continual spread of the English language, tends directly to widen the field of practice of the American bar, and make the world their clients.

An American lawyer is in no danger of getting into a rut. He is always dealing with novel situations. It has been said that the difference between a rut and a grave is that one is a little deeper than the other. The doctor, the minister, the business man, if he always keeps along the same track, unconscious or heedless of the constant changes in the environment of ideas and facts

which affect his relations to his work, will find himself gradually losing strength and heart. The lawyer can hardly follow such a course, if he would. Social progress soon takes the shape of law, and he must, at his peril, follow the development of that. Every new statute affects many interests which were, and many probably which were not, contemplated by its framers. How they are affected, and to what extent, are questions which in some degree it is the duty of every lawyer to study, and will be the duty of some to answer, if called on, to the extent of their knowledge and ability.

It would be by no means just to say that in the United States the highest rank in the profession belonged to the trial lawyer.

Few of the cases that might be brought are brought. Few of those that are brought are tried. Few of those tried involve any matter of difficulty, or offer occasion for any display of power except that of making a clear statement of the material facts, and their relation to each other.

A large part of every lawyer's business is to advise against bringing suits, or how to act so as to avoid a cause of litigation. Here he uses what is practically almost an absolute power, for his clients come to him because they trust in his judgment, rather than their own.

A Wisconsin lawyer said of one of his brethren who had passed away, that he was at his best "in his capacity of counsel, in his office, where every lawyer is a judge, and where in matters not litigated, vastly

exceeding those which are, he decides all questions." [1]

It was a main principle of Schopenhauer's philosophy that all pleasure is derived from the use and consciousness of power. This is a false generalization, but there is no doubt that much pleasure is attained in this way.

Every lawyer is in a position of power. His advice in a controversy that never goes to court will probably be controlling and, if it does become the subject of a law-suit, and he feels his power over judge and jury, it will be a great source of personal satisfaction.

His inclination, however, may lead him to a field where the best powers he has find no opportunity for display. He may seek to be a trial lawyer, when success for him lies in being an office lawyer. He may seek a line of practice, such as patent litigation, where scientific knowledge and aptitude are important, without having either. He may confine himself to criminal practice when his powers could better help him on in civil causes.

It is one of the attractions of the legal profession that so many doors to success, or at least to opportunity for success, are always open. If a lawyer enters one and finds nothing for him there, he has only to try the next.

1 Winslow, *The Story of a Great Court*, Chicago, 1912, p. 124.

CHAPTER III

OBJECTIONS TO CHOOSING THE LEGAL PROFESSION

1. *The Charge That it Leads to Dishonesty and Defense of Guilt*

Ancient prejudice against attorneys. Sir Walter Scott's opinion. The English attorney's work. Colonial prejudice here before the Revolution. Advancement since in standards of legal ethics. Sir Hiram Maxim's view. Macaulay's criticisms. Lord Campbell's statement. Professional pretenses. Statements as to the lawyer's own opinions. How he is to present his case. Baron Bramwell's views. Lord Halsbury's. Lord Erskine's. Mr. Justice Ellsworth's. Sir Matthew Hale's. Professional advice as to future conduct. Lord Brougham's characterization of a lawyer's duty. Lord Chief Justice Cockburn's. The defense of the guilty. Dr. Samuel Johnson's view. Cicero's. A lawyer's aid a necessity in conducting trials. Swinney's case. Plain cases seldom tried. A lawyer naturally takes his client's view. Any one safe in choosing any reputable profession.

Lawyers have never been favorites of popular literature.

"Why," says Hamlet, as a skull is dug up during his talk in the graveyard, "may not that be the skull of a lawyer? Where be his quiddities now, his quillets, his cases, his tenures and his tricks?"

Boileau-Despreaux, (echoed by Pope), attacks the rapacity of both lawyers and judges in his story of the disputants over the right to an oyster:

"There, take (says Justice), take ye each a shell:
We thrive at Westminster on fools like you.
'Twas a fat oyster,— live in peace — Adieu."

Mandeville jeered at lawyers who

"To defend a wicked cause,
Examined and surveyed the laws,
As burglars shops and houses do,
To see where best they may break through."

But gibes of this sort do not express the solid judgment of the community. Rogues may intrude into any profession, but their rascality is not to be imputed to the rest. A tricky or dishonest attorney condemns himself, and sinks to the very bottom of bad morals, but this ought not to sully the good name of the whole body to which he unhappily belonged.

Lord Bolingbroke once said that "the profession of law, in its nature the noblest and most beneficial to mankind, is in its abuse and basement the most sordid and pernicious." No fair-minded observer, however, will deny either that most lawyers are honest, or that the dishonest are quickly and effectively punished by the courts. The general verdict is none too favorably pronounced in these words, by Sir Walter Scott, long a close observer, by the requirements of an official position, of proceedings in court:

"In a profession where unbounded trust is necessarily reposed, there is nothing surprising that fools should neglect it in their idleness and tricksters abuse it in their knavery. But it is the more to the honor of those, (and I

will vouch for many), who unite integrity with skill and attention, and walk honorably upright where there are so many pitfalls and stumbling blocks for those of a different character. To such men their fellow citizens may safely entrust the care of protecting their patrimonial rights, and their country the more sacred charge of her laws and privileges." [1]

The term " attorney " has been degraded for English speaking peoples by the ancient division of legal business in England between the attorney and the barrister. Of these two, only the barrister, being a member of the bar, comes in direct contact with the court, on terms of social equality. The attorney, who prepares the cause for trial, is forced to leave the conduct of the trial and argument in the hands of the barrister. A position of professional inferiority is thus created, which the attorneys have felt keenly; and in the case of not a few it has reacted on the man's professional character, and he has stooped to trickery and fraud. Such a firm as the " Quirk, Gammon & Snap " which Warren has painted for us in " Ten Thousand a Year," is more possible in England than in the United States, where all lawyers stand practically on the same footing. It is partly for these reasons that the very name " attorney " has been substantially dropped in England during the last forty years and that of " solicitor " substituted.

There was a strong popular prejudice against lawyers in the State of New York shortly before the Revolution. It was proposed in the legislature to cur-

[1] *The Antiquary,* Vol. II, p. 270. Ticknor & Fields' ed.

tail the jurisdiction of the Supreme Court. One of the bar wrote thus to a brother lawyer, in regard to it:

"I look upon this bill as an effect of an almost universal prejudice against the law and its practices. You cannot conceive the violence of people's prejudices; whether they are groundless, or whether they are really chargeable to the body of the law in general, the respectable gentlemen on each side of the question hinder me from determining entirely.

"However this may be, the end aimed at is the total destruction of the profession,— a profession however without which society would not easily subsist." [1]

Similar legislation was urged in other of the American colonies. The next century saw less of this. There was less cause for it. The standard of ethics at the American bar was raised after the middle of the nineteenth century. To take an instance, a Massachusetts lawyer, soon after a stamp tax on contracts was laid by the United States to help meet the expenses of the Civil War, had to defend a suit before a justice of the peace on an unstamped contract. The Act of Congress provided that such a paper could not be "used in evidence in any court." The Massachusetts Supreme Judicial Court had recently held that these words were only intended to apply to United States Courts. The lawyer knew this, but did not inform the magistrate, claiming with success that the contract on which the plaintiff relied was inadmissible in evidence by the plain

[1] *Life of Peter van Schaack,* New York, 1842, p. 8.

terms of the statute. In 1910, when an old man, the lawyer who had thus imposed upon an officer of the State, published a volume of professional reminiscences, in which he justly said that this would then be called "sharp practice," although, forty years before, a law suit was quite commonly regarded as a mere contest of wits.[1]

There is, however, still, in many people, a deeply rooted opinion that the bar, both in England and the United States, is rapacious, tricky and deceitful. Sir Hiram S. Maxim, who has belonged to each country, and done a large business in each, has recently expressed it thus:

"The laws, having been made by the people, are as a rule wise and just; it is only the lawyers that are all wrong. There are vastly more lawyers than we have any use for — too many striving to make a living out of other people's troubles — and it is therefore to their advantage, when they get a case, to make as much out of it as possible, which means that instead of getting their client out of trouble and saving his money, they greatly prolong the agony and relieve him of as much money as possible."[2]

Is there now any basis for the position that lawyers are dishonest in putting forward claims which they know are without merit, while pretending that they are legal and just? Macaulay has voiced this charge with his usual vigor of statement:

"We will not," he says, in commenting on the proposi-

[1] Torrey, *A Lawyer's Recollections*, p. 122.
[2] Maxim, *My Life*, New York, 1915, p. 309.

tion that no advocate can justifiably use any discretion as to the party for whom he appears, "at present inquire whether the doctrine which is held on this subject by English lawyers be or be not agreeable to reason and morality; whether it be right that a man should, with a wig on his head and a band round his neck, do for a guinea what, without these appendages, he would think it wicked and infamous to do for an empire; whether it be right that, not merely believing, but knowing a statement to be true, he should do all that can be done by sophistry, by rhetoric, by solemn asseveration, by indignant exclamation, by gesture, by play of features, by terrifying one honest witness, by perplexing another, to cause a jury to think that statement false." [1]

There can be no doubt that a large part of the public believes the censure which is expressed in such utterances deserved. Better ground has existed for attributing such arts and pretenses to members of the English bar than to members of the American bar. Let Lord Campbell be called as a witness to this. A passage may be cited from his life of Lord Tenterden, in which, after highly praising the members of the Court of Common Pleas when Abbott presided over it, he goes on thus:

"Before such men there was no pretense for being lengthy or importunate. Every point made by counsel was understood in a moment, the application of every authority was discovered at a glance, the counsel saw when he might sit down, his case being safe, and when he might sit down, all chance of success for his client being at an end. I have practiced at the bar when no case was secure, no case was desperate, and when, good points being overruled, for the

1 Macaulay, *Essays*, Philadelphia ed., Vol. II, p. 325.

sake of justice it was necessary that bad points should be taken; but during that golden age law and reason prevailed — the result was confidently anticipated by the knowing before the argument began — and the judgment was approved by all who heard it pronounced — including the vanquished party. Before such a tribunal the advocate becomes dearer to himself by preserving his own esteem, and feels himself to be a minister of justice, instead of a declaimer, a trickster, or a bully." [1]

There is a reflex meaning in the concluding words, which certainly may be taken as some indication that Lord Campbell and Lord Macaulay were of much the same opinion as to the scope of professional duty.

The true lawyer never pretends, in arguing a cause, to feel a passion of emotion to which he is really a stranger. That is, in the words of Chief Justice Bleckley of Georgia, in his address on "Truth at the Bar," a lie of the soul. Nor does he assert that to be true which he knows to be false, or that to be law which he believes to be not law. He does not even say to the jury, where there is a conflict of evidence, that he believes a certain state of facts to exist, thus offering his belief as a ground for theirs. One of the leading men now on the American bench has declared that "when counsel so far forget their duty as to express their belief as to the question of fact, the trial judge should instruct the jury that counsel have no right to express their opinions on such matters." [2] Nor is a

[1] Campbell, *Lives of the Chief Justices of England,* Vol. IV, pp. 297, 298.

[2] Carter, *Ethics of the Legal Profession,* p. 47.

lawyer ever bound to state to the court his own opinion on any point of law, which he may be trying to maintain. His opinion may be against the claim which he is making for his client, and which he ought to make in his behalf. His obligation is to present that view whether as to law or fact which is most favorable to his client, if it seems to him to be possibly tenable; and to present it in the strongest light which he can bring to focus on it. His own personal opinions are not in question.

Baron Bramwell, who was one of the leading judges of his day in England, said:

"A man's rights are to be determined by the court, not by his attorney or counsel. It is for the want of remembering this that foolish people object to lawyers that they will advocate a case against their own opinions. A client is entitled to say to his counsel, I want your advocacy, not your judgment; I prefer that of the court." [1]

The same thought was expressed more recently, in referring to a claim put forward by counsel, by Lord Chancellor Halsbury (as quoted in the London *Law Notes* for October, 1899), in these words:

"A thesis has been propounded on the other side more extravagant, and certainly more impossible of fulfillment; that is, that an advocate is bound to convince himself, by something like an original investigation, that his client is in the right, before he undertakes the duty of acting for him. I think such a contention ridiculous, impossible of performance, and calculated to lead to great injustice. If an advocate were to reject a story because it seemed im-

[1] Johnson v. Emerson, *Law Reports, 6 Exchequer,* p. 367.

probable to him, he would be usurping the office of the judge, by which I mean the judicial function, whether that function is performed by a single man, or by the composite arrangement of judge and jury which finds favor with us. Very little experience of courts of justice would convince any one that improbable stories are very often true, notwithstanding their improbability."

Lord Erskine, in his defense of Thomas Paine, painted in strong colors the injustice that might be done to one charged with crime, for whom a lawyer of prominence should refuse to appear. "If," he said, "the advocate refuses to defend, from what he may think of the charge or the defense, he assumes the character of the judge; nay, he assumes it before the hour of judgment; and, in proportion to his rank and reputation, puts the heavy inference of perhaps mistaken opinion into the scale against the accused, in whose favor the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel." [1]

Judge Ellsworth, afterward chief justice of the United States, said to Jeremiah Evarts, who was anxiously inquiring as to the right of a lawyer to maintain the side of a lawsuit that was doubtful or wrong, "any cause that is fit for any court to hear is fit for any lawyer to present on either side." Neither judge nor lawyer can with certainty determine the real right of a cause until both sides are heard; and even then the weakness and the wrong which cling to almost every

[1] Campbell's *Lives of the Lord Chancellors*, London, 1846–69, VIII, 296.

thought and act and judgment of man too frequently prevent complete justice.

Sir Matthew Hale, in the early years of his practice, had much misgiving about undertaking causes in which he did not thoroughly believe, but lived to change his opinion, as case after case which he had refused to consider was finally decided to be abundantly good.

A lawyer may well undertake a doubtful cause, but never can he righteously advocate what he knows is not law, nor can he counsel or assist in the evasion or disregard of law. It is one thing to secure for a client his rights concerning a past transaction, to insist that his guilt be legally proven, to claim in his behalf all that to which he is by law entitled. It is another thing to counsel and assist concerning a future course of action which either evades or disregards the law.

A passage of fervid oratory has been often quoted from the speeches of Lord Brougham, in which before the House of Lords in defense of Queen Caroline he put forward an impressive, but untrue, picture of the duty of an advocate. It is this:

"I once before took occasion to remind your Lordships, which was unnecessary, but there are many whom it may be needful to remind, that an advocate by the sacred duty which he owes his Client, knows in the discharge of that office but one person in the world, that Client and none other. To save that Client by all expedient means, to protect that Client at all hazards and costs to all others, and among others to himself, is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction which he may

bring upon any other. Nay, separating even the duties of a parent from those of an advocate, and casting them, if need be, to the wind, he must go on reckless of the consequences, if his fate it should unhappily be to involve his country in confusion for his Client's protection."

Brougham later repudiated this doctrine, writing that it was proclaimed in the course of a political trial as a political menace.[1]

The true view was well stated by Lord Chief Justice Cockburn, at a banquet in the Middle Temple Hall, in honor of M. Berryer, in which he spoke in these words:

"Much as I admire the great ability of Monsieur Berryer, to my mind his crowning virtue — as it ought to be of every advocate — is, that he has throughout his career conducted his cases with untarnished honor. The arms which an advocate wields he ought to use as a warrior, and not as an assassin. He ought to uphold the interests of his clients per *fas*, and not per *nefas*. He ought to know how to reconcile the interests of his clients with the eternal principles of truth and justice." [2]

The protection of law, like the showers from the heavens, descends upon the just and the unjust, alike. Who indeed is to say which side in a lawsuit is in the right? Who is to determine the guilt or innocence of one prosecuted for crime? These are necessary functions of judges and juries, rather than lawyers.

Boswell once asked Dr. Johnson if a lawyer could honestly support a cause which he knew to be bad. "Sir," was the reply, "you do not know it to be good

[1] Forsyth, *History of Lawyers*, New York, 1875, p. 380.

[2] Crispe, *Reminiscences of a K. C.*, p. 73.

or bad till the judge determines it. I have said that you are to state facts fairly; so that your thinking, or what you call knowing, a cause to be bad, must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. But, sir, that is not enough. An argument which does not convince yourself, may convince the judge to whom you urge it; and if it does convince him, why, then, sir, you are wrong, and he is right. It is his business to judge; and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear the judge's opinion." [1]

At a subsequent period, the subject came up again during a conversation in the course of which one of the company, Sir William Forbes, remarked that "he thought an honest lawyer should never undertake a cause which he was satisfied was not a just one." "Sir," said Johnson,[2] "a lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge. Consider, sir, what is the purpose of courts of justice? It is, that every man may have his cause fairly tried, by men appointed to try causes. A lawyer is not to tell what he knows to be a lie: he is not to produce what he knows to be a false deed; but he is not to usurp the province of

[1] Boswell, *Life of Samuel Johnson,* New York, 1856, Vol. I, p. 245.

[2] Boswell, *Ibid.,* p. 328.

the jury and of the judge, and determine what shall be the effect of evidence,— what shall be the result of legal argument. As it rarely happens that a man is fit to plead his own cause, lawyers are a class of the community, who, by study and experience, have acquired the art and power of arranging evidence, and of applying to the points at issue what the law has settled. A lawyer is to do for his client all that his client might fairly do for himself, if he could. If, by a superiority of attention, of knowledge, of skill, and a better method of communication, he has the advantage of his adversary, it is an advantage to which he is entitled. There must always be some advantage, on the one side or the other; and it is better that advantage should be had by talents than by chance. If lawyers were to undertake no causes till they were sure they were just, a man might be precluded altogether from a trial of his claim, though, were it judicially examined, it might be found a very just claim."

Cicero, in discussing the same question, speaks with more hesitation: "This precept of duty is to be carefully obeyed, never to prosecute an innocent person on a charge of a capital crime, for this cannot be done without guilt, whatever agreement may be made. Nor, the less, as this is to be avoided, is it to be held a sacred duty, to defend a guilty man sometimes; only not if he be nefarious and impious. This the majority of the people desire; usage permits; humanity even urges. It is the part of a judge always to pursue the truth in causes heard before him; of an advocate (*patroni*)

sometimes to defend what looks like the truth, even if it be less than true." [1]

It must always be remembered, not only that every man who is sued in court must be heard in defense, unless he waives it, or acknowledges that he is in the wrong, but that he can only be heard to good purpose, through a lawyer.

Hence no one at the English bar can, without the approval of the benchers, refuse to accept a retainer for the defendant in a criminal cause. For the American bar there is no such rule, but the reason for it equally exists. It controlled, in a noted instance, the professional conduct of William Wirt, afterwards Attorney General of the United States. In 1806, George Wythe, a signer of the Declaration of Independence, and Chancellor of Virginia, lived in Richmond, and a nephew named Swinney, to whom it was known that he had left most of his property by will, was one of his family. One morning Swinney came into the kitchen and in the presence of a negro cook, dropped what she described as something white in the coffee pot. The Chancellor soon after breakfast became violently ill, with symptoms of arsenical poisoning. A man servant drank of the same coffee and died with similar symptoms. The coffee grounds were thrown out in the back yard, and some chickens which ate them died. An examination by chemists showed the presence of arsenic in the coffee grounds, in large quantity.

[1] Cicero, *De Officiis,* Lib. III, Cap. 14.

The Chancellor lived long enough to alter his will and revoke its dispositions in favor of his nephew, who was soon afterwards indicted for murder.

Swinney's mother applied to Wirt to defend him. He took counsel with one of the judges of the State, who advised him strongly to do so, and said that he ought not to hesitate a moment. He accepted the retainer and appeared for the accused.

There was a perfect defense. The law of Virginia at that period excluded the testimony of negro witnesses when offered against a white man. The negro cook was the only witness that could connect Swinney with the crime. She being excluded, the jury, when the case came on, rendered a verdict of acquittal.[1]

Wirt was right. If Virginia then had an ill-considered statute, which prevented the State from offering legal proof of the guilt of the accused, the defense was perfect. Swinney could have honestly raised that point, for himself, had he known what every lawyer knew, namely, the objection to the evidence and the proper manner of taking advantage of it. Not knowing these things, he was entitled to ask the aid of those who did.

But such a case as that is extremely unusual. In most matters in which counsel are asked to engage, there may well be a difference of opinion as to the rights of the parties. Plain cases are seldom tried. In every legal controversy there are apt to be some points favor-

[1] Kennedy, *Memoirs of William Wirt*, New York, 1872, Vol. I, p. 140.

able to the plaintiff and some favorable to the defendant. It was the remark of an eminent English lawyer of large experience that men usually imagine that all law suits are either black or white, whereas the great majority are neither black nor white, but gray.

There are many also as to which an impartial eye can see that they can fairly be decided for either party, though to each of them an adverse judgment would look like the rankest injustice. A lawyer is naturally inclined to share his client's point of view. Once in a cause he is apt to grow more and more confident that it is a meritorious one. He studies it from the position of an advocate. His mind becomes, as to this subject of discussion, more and more identified, so to speak, with that of his client.

Joubert said that it is a great disadvantage in a disputation to be impressed with the weakness of your own claims and with the strength of those of your adversary.[1] The lawyer seldom finds himself in such a position. He looks at things through his client's eyes. He has thought over his points, till they seem convincing, and found an answer of some kind to every contention which he thinks likely to be put forward by the other side.

All civilized nations have not created the legal profession, and created it as soon as they even approached civilization, without a real justification for it. There

[1] *Pensées*, No. 639, "*C'est un grand désadvantage, dans le dispute, d'être attentif à la faiblesse de ses raisons, et attentif à la force des raisons autres.*"

would be none, if its members were expected to be cheats and liars. As Coleridge has said, in his *Biographia Literaria*, " it would be a sort of irreligion, and scarcely less than a libel on human nature to believe that there is any established and reputable profession or employment in which a man may not continue to act with honesty and honor."

2. *The Tendency of the Legal Profession to Foster a Spirit of Roughness and Antagonism*

Habits form character. A lawyer risks becoming hypercritical; first a fault-finder in court and then at home. He must learn not to treat any legal controversy as his own. Nor every hostile witness as a liar.

A man's intellectual habits are a large part of him. They go far to determine the quality of his life, and its success. In forming them, then, he should be careful to avoid any that would militate against his own happiness or that of others. In choosing a calling, he should carefully consider what, if any, will be its effect in this direction.

Law is a science of reciprocal relations. Those who cultivate it are naturally led to draw fine distinctions, and will often have to choose between opposite opinions. These will require critical examination and close comparison.

A lawyer, in the ordinary course of his practice in court, is continually questioning or denying the soundness of the propositions put forward by his professional opponent. There is always danger that a habit of mind

will be thus formed, or at least a spirit of hostile criticism encouraged, which will follow him out of the court room, and become a characteristic of his life.

An English barrister, alluding to this tendency towards contradiction of what others say, acquired at the bar, remarks that

> " In many a case the caustic tone, assumed at the outset as a professional weapon, becomes habitual and, without the speaker's knowledge, gives more pain within his home, than in Westminster Hall." [1]

So a lawyer must be on his guard against bringing the technical practices and habits of the bar in matters of procedure into the intercourse of general society.

It is said of Lord Chief Justice Tenterden, to whom forms were of the essence of any judicial establishment, that once, at a " circuit dinner," at which he presided, " having asked a country magistrate if he would take venison, and receiving what he deemed an evasive reply: ' Thank you, my Lord, I am going to take boiled chicken,' his Lordship sharply retorted, ' That, sir, is no answer to my question; I ask you again if you will take venison, and I will trouble you to say yes or no, without further prevarication! ' " [2] The story, true or not, is no bad illustration of a real pitfall into which every lawyer and every judge runs some risk of falling. It is sadly easy for him to sink into the condition of an habitual faultfinder.

[1] Jeaffreson, *A Book about Lawyers*, p. 324.

[2] Campbell, *Lives of the Chief Justices of England*, New York, 1873, Vol. IV, pp. 302, 343.

The man who is always carping, and contradicting, and pointing to weak spots in the conduct of other people, will make few friends, and deserve few. There is to every trial lawyer a subtle and half hidden temptation to drop into such a mental habit. Most of them resist it effectually. A few fall under the spell, but there is no reason why any should. The contests of the court house can be absolutely dropped when the case is finished; nor, if conducted in a proper spirit of professional fraternity, need they ever lead to ill-feeling at the bar. Still less need they disturb the lawyer's social relations with anybody.

A lawyer represents his client's case, but not his client's personal feelings or qualities of character. His conscience remains in his own custody. As was said by the late Thomas H. Hubbard, the founder of a lectureship in Legal Ethics in the Law Department of Union University,—"the controversy, with all its attendant exasperations, is the client's controversy. Its asperities, its irritations, its impulses, its interests, are not the lawyer's, save as he receives them from the client. If he receives them in bulk, as a common carrier receives all goods that are offered; if, as the servant of the client, he carries them through all the portals and into the temple of justice; if he surrenders his own convictions to the wishes of his client, then he gives to his cases the elements that retard justice and bring the practice of the law into disrepute. He obtrudes upon the court the passion, the prejudice, the unreason of the client. These should be left outside the court-house door. The

controversy that crosses the threshold should be a controversy sifted by the intelligence and shaped by the conscience of the lawyer. It should be the essence of honest difference in the assertion of rights, not the turmoil of personal dispute." [1]

A lawyer must, no doubt, also be on his guard against allowing his disbelief in the testimony of a hostile witness to lead to a line of treatment on cross-examination, which is unfair or unnecessarily rough. Most men mean to tell the truth on the witness stand, and a lawyer must always remember that every witness must testify from his own standpoint, which cannot, in mind or body, be precisely that of any one else.

Nor does a harsh cross-examination, under most circumstances, make a favorable impression either on the court or jury. An English judge once interrupted a discourteous and savage cross-examination by saying to the offending barrister, "You seem to think that the art of cross-examination is to examine crossly."

There is a real danger here of injuring one's client, while trying to serve him, and of injuring oneself, as well. It is not always a danger apparent to the lawyer, himself, nor therefore one against which it is easy to guard. At best a court of law is not a school of good manners. It has to do with people of all sorts and conditions. In every trial two interests are opposed and each has its chosen champion. A certain duty of antagonism is involved, on the part of each of them.

[1] *Lectures delivered before the Students of Law Department of Union University*, 1903, p. 16.

Each is to keep out all testimony which has no bearing on the cause, or which is adverse to his client, and is of a kind which is excluded by legal rules. He must act promptly if he does his duty in these respects. He cannot always stop to make a nice choice of words. He is often tempted to speak sharply to a witness or to the opposing lawyer, and is not unlikely sometimes to yield to the temptation. As often as he does, he increases the risk that his professional habits may prejudice the peace of his own household.

3. *The Charge that Legal Procedure is Antiquated and Unfair*

The necessity of known rules of procedure. The chain of ignorance, procedure, knowledge, and justice. Remedies presuppose rights. *Summum jus, summa injuria.* The uncodified common law. Its constant change. The Roman law never fully codified. How courts add to law. Violation of rules of procedure may defeat a meritorious cause. Artificiality in rules of evidence. Is an incident of our jury system. Becomes less as jurors have more education. The uses and abuses of a jury. Its guidance by the court. Excessive multiplication of law reports. Unofficial reporting. The citations of decisions.

The whole of that law which is administered by lawyers is bound up with the modes and forms of judicial procedure. It cannot be otherwise. Courts exist to do justice between man and man, but always by following certain prescribed rules and methods. To give them an opportunity to act, causes of controversy must be brought before them, and brought before them in a proper way. Judges do not play the part of policemen,

and walk the streets with a view to preventing wrong or arresting the wrong doer. Nor do they take the place of teachers and announce certain doctrines to which men generally must conform. They are only concerned with announcing or recognizing such as govern certain relations of the parties to a particular law suit. The steps that throw upon them this responsibility are such as only lawyers know how to take. In early political societies they are very formal. Civilization simplifies them but, however high it may rise, courts still remain a device for doing justice through a prescribed mode of procedure. This mode is prescribed because it is generally deemed fair, or else was at one time generally so deemed and is not now generally deemed unfair. It is prescribed in advance of any resort to it; and by the State. Being a body of public rules by which all are bound, and to substantial obedience to which all are entitled, this obedience is a necessary condition of getting justice or doing justice.

Chief Justice Bleckley of Georgia has put this very clearly:

"The problem for the judicial mind as a whole, whether all on the bench or some in the jury box, is to pass from ignorance to justice. Every Court, (by which I mean the aggregate of the deciding power,) though it may know beforehand the general law and facts common alike to all cases, or to all of any given class, is ignorant of the special law and facts involved in any particular case. While this ignorance continues justice is not discernible, and hence there is no way to pass immediately from ignorance to justice unless by mere chance, by casting lots or otherwise

appealing to fortune. To pass intelligently, ignorance must be succeeded by knowledge, the steps being, first, from ignorance to knowledge of truth, and, secondly, from knowledge of truth to justice. The means of making this movement is procedure; and so, with ignorance at one extreme and justice at the other, the whole line, filled up, is as follows: ignorance, procedure, knowledge, justice. Knowledge being indispensable to justice, and procedure indispensable to knowledge, procedure is the portal, the only portal, to justice. Without it a Court could not distinguish from injustice — could not recognize or identify justice, so as to determine either its presence or its absence. No matter, therefore, on which side of a case justice may be, or whether partly on one side and partly on the other, procedure is something in which both parties have an interest, to say nothing of the interest in it of the Court or of the public as the only means of carrying on judicial work and making Courts available. This interest of the parties is so important that every rule of procedure, unless purely discretionary with the Court (as some of them are), is always attended with a corresponding right of procedure, vested in one or both of the parties, each party having the rights appropriate to his position in the case as plaintiff or defendant. The result is, that incident to these rights there is a body of remedial justice — justice of procedure, which is altogether apart from and quite independent of justice of substance, or the ultimate justice of the case. Relatively to procedure, any and every case is just on both sides, for each side has rights of procedure, and it is just that these rights should be allowed and administered according to the rules which grant and govern them. It is through rights of procedure that rights of substance are judicially ascertained; through justice of procedure justice of substance is administered." [1]

[1] Bleckley, *Truth at the Bar*, p. 6.

Legal procedure rests on the principle that where there is a right, there must be a remedy for its enforcement and against its violation. *Ubi jus, ibi remedium.* Equally is it its doctrine that where a claim of right is founded on a wrong, the law will give no remedy. *Ex turpi causa actio non oritur.*

In a case arising in Wisconsin, a lawyer sought to recover fees which he claimed to have earned by legal services under a retainer to influence a public prosecuting officer to allow one charged with crime to get off with a minimum of punishment. The court held that such a contract was against sound morals, and could not be enforced although the services were rendered, and were successful. In giving the judgment of the court, Chief Justice Ryan used this language:

"The profession of the law is not one of indirection, circumvention, or intrigue. It is the function of the profession to promote, not to obstruct the administration of justice. In litigation the lawyer becomes the *alter ego* of his client; and professional retainer rests in absolute and sacred confidence. But the duty imposed by professional retainer is direct and open. Professional function is exercised in the sight of the world. Professional learning and skill are the only true professional strength. Forensic ability is the only true professional influence on the course of justice. Private preparation goes to this only as sharpening the sword goes to battle. Professional weapons are wielded only in open contest. No weapon is professional which strikes in the dark. The work of the profession is essentially open because it is essentially moral. No retainer in wrong is professional. A lawyer may devote himself professionally to the legitimate business of his client,

but he cannot be retained in whatever may not be rightfully and lawfully done. He may defend a wrong done in the past, but he cannot be privy to the doing of a wrong in the present. The profession is not sinless, but its sins are all unprofessional. When a member of the bar is privy to the wrong-doing of his client, he is his client's accomplice, not his lawyer." [1]

Courts of justice may become, in rare cases and for the purposes of a particular judgment, courts of injustice. This is part of the necessary order of things, under a system of permanent rules of procedure and decision. The parties would not be justly dealt with, unless the court applied the rules as they exist, notwithstanding it may support the maxim, *Summum jus, summa injuria.* Here is one of the things that kings are good for. Relief must be sought for the past in the pardoning or dispensing power, if such there be; and for the future in a change of legislation.

Legal procedure takes its color from the nature of the law, the proper effect of which it is designed to secure. The law to be studied and invoked by American lawyers is in the main the Anglo-American common law. If it were to be found in the shape of a code framed, like that of France, a century or more ago, its mode of expression would be necessarily somewhat antiquated; and some of its rules might well be, also. But the common law, never having been wholly and systematically reduced to written form, leaves far greater freedom in the people, if not the courts, to make im-

[1] Wight v. Rindskopff, 43 *Wisconsin Reports,* p. 344.

provements in it, adding or retrenching from time to time, in conformity with the spirit of the age, and agreeably to the ripened common sense which gives it character.

It is this which has kept most of the American States from endeavoring to codify with any fullness their municipal law. They have preferred to leave it mainly unfettered by legislatures and, so far forth, capable of expansion or contraction, according to popular needs and usages, fortified by judicial opinion.

Law, in its widest sense, indeed, is anything but stationary. It changes and must change as the views of civilized society change.

> "New times demand new measures and new men.
> The world advances and in time outgrows
> The laws that in our fathers' day were best."

There are great advantages in trusting to a common law, the creation of the people, rather than to a code, the creature of legislation. One is elastic; the other rigid. One registers conclusions reached in the past; the other rules laid down for the future.

No nation has ever had a complete system of codification. The system has rested on remoter rules of conduct, not officially formulated, which from time to time have vindicated, or may vindicate, their right to exist, by their harmonious relations to the life and wants of the community.

Those who have never read them sometimes speak of the Pandects of Roman law, or the Institutes of Justin-

ian, as a code. They are an official collection of legal definitions and principles and opinions of jurists, but they are far from being a code in the sense of the civil code of France or the German *Bürgerliche Gesetzbuch.* Sir James Stephen, no mean authority, in the introduction to his work on Evidence, speaks of them thus:

"It would be a complete mistake to suppose either that the Roman Law is in substance wiser than our own, or that in point of arrangement and method the Institutes and the Digest are anything but warnings. The pseudo-philosophy of the Institutes, and the confusion of the Digest, are, to my mind, infinitely more objectionable than the absence of arrangement and of all general theories, good or bad, which distinguish the Law of England."

This quality of Anglo-American law renders it particularly fitted for a country like the United States where there are over fifty States and Territories, each exercising legislative power and each mainly independent of every other. In the common law they have all the same thing to work from. They may, or they may not, come to the same results, but they proceed from a common point of departure.

Let us consider a single case which clearly illustrates the growth of municipal law in judicial practice and by judicial power.

A deed of a lot of land in a city of Connecticut was given, in which it was bounded on a private passway. When a boundary by deed is given as on a public highway, the law of that State had always construed it as presumptively embracing half the land adjoining that

so described, which is occupied by that highway, subject, of course, to its use for all proper highway purposes. But whether the conveyance of a lot bounding on a private passway presumptively carried the title in like manner to half the land used for the passway had never been determined either by its legislature or its courts. More than twenty years after such a conveyance was made, the claim that it did so carry title was set up by one who then held under the deed. The court overruled the contention, in an opinion from which the following quotations are made:

"The effect of a deed of land depends on the words in which it is expressed, aided, if necessary, by a consideration of the circumstances leading up to its execution and the situation of the property. The ultimate object is always to give its terms such an interpretation, if this can be done without straining them beyond their fair import, as will carry out the intention which the parties may be presumed to have had in employing them. . . .

"The point of law involved has been differently decided in different States. In Massachusetts it has been roundly held that a deed of land bounded on a private way, laid out over land of the grantor, passes the fee to the middle of the way, where there is nothing in the deed to require the opposite construction. Fisher v. Smith, 9 Gray (Mass.) 441, 444; McKenzie v. Gleason, 184 Mass. 452, 69 N. E. 1076. In Maine an opposite conclusion has been reached. Ames v. Hilton, 70 Me., 36, 43. There is here no statute or judicial precedent which governs, nor any general custom of which we can take judicial notice. The question is one, also, not settled by the common law. It is therefore our duty to answer it by the choice of the rule which, in our judgment, is best calculated to do justice in cases of this

character. This we have done. We adopt that which does not raise, in case of a boundary on a private way, the presumption which obtains in case of one on a highway. By that rule, because it is (or by our adoption of it becomes for Connecticut) the rule of justice, it may fairly be assumed *prima facie* that the parties to such a transaction intended to be governed, by force of the words which they employed." [1]

Legal science has been not infrequently criticized because what it recognizes as the law of pleading or of evidence often bars out any investigation into the substantial merits of a just cause. But it is as just that a man should be compelled to state or prove his case before a court according to fixed rules, as it is that he should have a just case to present.

Chief Justice Bleckley, with his accustomed clearness of thought, states it thus, in the paper to which reference has been made above:

"Some meritorious cases, indeed many, are lost in passing through the justice of procedure; but they are all justly lost, provided the rules of procedure have been correctly applied to them. That a just debt is unrecognized, a just title defeated, or a guilty man acquitted, is no evidence that justice has not been done by the Court or the jury. It may be the highest evidence that justice has been done, for it is perfectly just not to enforce payment of a just debt, not to uphold a just title, not to convict a guilty man, if the debt, or the title, or the guilt be not verified. It is unjust to do justice by doing injustice. A just discovery cannot be made by an unjust search. An end not attainable by just means is not attainable at all: ethically, it is an impossible

[1] Seery v. Waterbury, Vol. 82 *Connecticut Law Reports*, p. 567.

end. Courts cannot do justice of substance except by and through justice of procedure. They must not reach justice of substance by violating justice of procedure. They must realize both, if they can, but if either has to fail it must be justice of substance, for without justice of procedure Courts cannot know, nor be made to know, what justice of substance is, or which party ought to prevail." [1]

Every one who engages in the legal profession is at first struck and repelled by the artificiality of the rules of evidence. In trying causes in court there is the same end that is proposed in any outside inquiry, which may be made to ascertain what are the facts decisive of some controversy. But out of court, no door through which information may be obtained is closed. In court, on the contrary, the exclusion of "hearsay" evidence; the requirement of more than one witness in certain criminal prosecutions; the distinction between the amount of proof demanded in criminal cases and that deemed sufficient in civil cases; the denial of resort to the interrogation of one accused of crime; and the exclusion of evidence which the judge may think too remote or uncertain; seem to surround the investigation of the truth by a cloud, though by no means a "cloud of witnesses."

These rules have come in mainly as incidents of our system of trial by jury, but in part also from our high appreciation of the dignity and worth of the individual man.

It is enough to say that as juries have become better

[1] Bleckley, *Truth at the Bar*, p. 10.

educated, there is continually less and less occasion for guarding them from being led off into irrelevant inquiries or mistaken conclusions, and that judges, who made most of these rules of evidence, are gradually readjusting them to the requirements of common sense.

At first sight, it would seem that a jury trial was but a poor way of deciding controversies. Anacharsis said of Athens that in her assembly the wise men argued causes, but the fools decided them. A keener mind put the matter in a clearer light. Aristotle said that it was safer to depend on the judgment of the many, than of the few. In a large body of men no one person might be particularly eminent. Nevertheless, each had some valuable quality or faculty that was noticeable, and together they possessed them all.

The jury is not as numerous as an Athenian assembly, but its members have a considerable variety of qualities, and something of what is addressed to them in argument is pretty sure to appeal to one of them, if it does not to another. It is a reasonably fair miniature of the community.

The unwillingness of jurors to find a fellow-creature guilty of a capital felony, even on the clearest evidence, is notorious; and it may well be suspected that they frequently violate their oaths in favor of life. In civil suits, on the other hand, they too often forget that their duty is merely to give the plaintiff compensation for evil suffered; and if the conduct of the defendant has moved their indignation and his fortune is known to be

large, they turn themselves into a criminal tribunal and, under the name of damages, impose a large fine.[1]

A jury is and must remain an indispensable part of the machinery of justice, under the terms of our constitutions, state and national. But, as to almost every other conventional feature of judicial procedure, the modern tendency is to invest the courts with power to change it within certain limits at their discretion. Some have naturally gone farther than others in exercising this authority. Only a strong man, with a strong court behind him, can venture to abrogate a usage of centuries. Chief Justice Doe of New Hampshire may be mentioned as one whose work in this field of judicial action has been particularly bold and thoroughgoing.[2]

Dean Swift complained, two hundred years ago, in the preface to *Gulliver's Travels*, that he had hoped at their first appearance that they would effect something, and that he should hear in England of "judges learned and upright; pleaders honest and modest; with some tincture of common sense; and Smithfield blazing with pyramids of law books." Bench and bar have improved since this caustic and half true criticism of English judicial procedure was written, but the law books, instead of being burned, have grown ten-fold. This is mainly from the enormous increase of the reports, official and

[1] Macaulay, *History of England*, Vol. VIII, p. 44.

[2] See Lisbon v. Lyman, 49 *N. H. Law Reports*, p. 382; Darling v. Westmoreland, 52 *N. H. Law Reports*, p. 401.

unofficial, of judicial opinions. The modern text-books in law are mainly based on these, and much of legal instruction comes from the same source.

In an address given in New York in 1915, Lord Chief Justice Reading said that he was strongly impressed with the undesirability of the constant reporting of decisions which lay down no new principle, but only report the application of old principles to new facts, and that the members of the bar would have a feeling of satisfaction if they could get rid of their thousands of volumes of decisions so that they might base themselves on the solid principles of the law.

To the charge then that the established system of reporting judicial decisions and the uses made of it, if ever defensible are so no longer, there is, in the opinion of the writer, no good answer. It is antiquated. It belongs to an era of different social conditions. It adds enormously to a lawyer's office expenses. It leads him aside from the consideration of the principles of the law, to study particular instances of their application, sought out not for purposes of illustration but for use as authority. It lengthens his briefs, unduly: it deadens the tone of his arguments to the court. It makes "case-lawyers," whose minds move in a narrow circle.

If the system is to be maintained, these evils will grow. Others may be mentioned, in passing, which are also threatening.

The ills arising from the publication of decisions not worth reporting are obvious. There has been, however, in some of our states a failure to publish decisions,

which has been much more unfortunate. In a state of small population, or where the judges are overburdened, or think they are, it has often happened that several years have elapsed between the adoption of an opinion by the court and its appearing in a volume of reports. In New Hampshire, in 1899, no official reports of the decisions of the Supreme Court had appeared since 1891. The bar, under such circumstances, is compelled to move in the dark.

Unofficial reporting has done something to relieve the situation in such cases, but what is unofficial is unauthoritative. Judges often make changes in opinions between the time when they were pronounced and that when they are published by the State. In such a case the official reports are conclusive as to what was decided.

It does not seem improbable that the time will come when counsel will be restricted by positive rule, in ordinary cases, as to the number of reported cases which they can cite in argument. Possibly the courts may go farther and forbid any statement from counsel as to any cases, except those of their own state, or the United States.

Meanwhile the arguments which courts of ability like best to hear are those which assume their knowledge of the principles of law, without stopping to recite them, and proceed at once to state how it is claimed that they apply to the case in hand.

A closer supervision over what goes into the reports will also, doubtless, come before many years. It is right

that in all cases carried to the courts of last resort their opinions should be written and filed in the clerk's office, where the parties to the cause can examine them. This helps to prevent hasty decisions, for which no sound reasons can be assigned. But that new cases should be reported for the public eye, which simply repeat what has already been judicially determined in the same jurisdiction or re-assert familiar principles of the common law, is an intolerable practice for a country where fifty such courts exist.

CHAPTER IV

THE PERSONAL QUALITIES REQUISITE FOR SUCCESS IN THE LEGAL PROFESSION

Ability. Industry. Steadiness. Good sense. Knowledge of human nature. Endurance. Good character. Resolution. Imagination. Oratorical power not a necessity. Cannot supply want of legal knowledge. Power of clear statement. Deliberation. Resting case on settled principles. Burke's practice as to this. Self-confidence. Ability to respond to sudden call. Close study of one's cases. Readiness to seize opportunities. Preparation of argument as to form.

In no profession will success be probable as to one who is not of fair ability and industrious habits. In addition to these, the practicing lawyer should have steadiness of purpose, good sense, good judgment, and good knowledge of the workings of the human mind. He should also have the faculty of turning quickly from one subject to another; of ordinarily putting aside his business at night, so that it will not disturb his sleep; and of bearing up under a sudden strain.

James A. Bayard of Delaware wrote from Europe, in 1814, to his son, who had just entered the bar: "Great industry and perseverance seldom fail to make a good lawyer, and no talents, without industry, will produce the same effect."

A good character is a man's best capital in all callings. It is the indispensable capital for a successful

lawyer. Proof of it, (such as can be had), is almost universally required from every applicant for admission to the bar. Loss of it, after admission, is cause for disbarment. The immense trust put in a lawyer by his clients can rest on no other foundation than his integrity. A man who, after obtaining a judgment for another, of whatever amount, can collect and discharge it, can find little employment in the courts, unless he is and is known to be honest. Without that, indeed, he cannot really know what law and equity are, and what they demand. Professor Theodore W. Dwight used to say to his classes in Equity Jurisprudence: "No one can be a good equity lawyer unless he is himself a good man."

Another necessary quality is resolution. When a lawyer is once enlisted in a cause, he must be ready, at all costs to himself, to do his best. Sheil, the Irish barrister, once said, with much truth, that without hardihood of purpose and contempt of consequences, nothing great in thought or action can be accomplished at the bar.

A lawyer will be much assisted in his practice if he be gifted with strong imaginative faculties. Whether in court or in his office he is always being called upon to forecast the future. His client wishes him to draw a contract for a certain purpose or in a certain way. How will the other party to the bargain understand, and have a right to understand, the provisions? He is about to argue a cause. What are the claims that may be advanced by the other party?

A Japanese officer once said that a private soldier

who had powers of initiative and imagination was worthless. His business was to obey orders, without forecasting their consequences. The position of the lawyer is diametrically the reverse. He obeys no man's orders. His client's directions do not bind him as to matters where the law gives him discretionary powers. His business is to anticipate the course of future events; to predict how a cause will be, because it ought to be, decided; to initiate theories of prosecution or defense; and in all these things the imagination is often his safest guide.

To command the attention of a popular assembly one must have either strength of mind or strength of manner. To command that of a judge, or even of a jury, neither is absolutely required. It is not at all necessary that a trial lawyer should have what is commonly known as oratorical power, though it will be of great advantage to him to possess it.

Schiller described oratory as the art which carries on a business of the intellect as a free play of the imagination. The main point is to do well this business of the intellect. It may be conducted by mathematical and logical methods, though in such case the labor of the orator will have been greater, and the satisfaction of his auditors less. It may be accomplished by the flashlights of the imagination, but they should not be turned on until the intellect has done its work, and a work that needs only to be seen to be appreciated.

No art will long conceal inferiority at the bar, if it proceeds from want of legal knowledge. Lord Erskine wrote to an American correspondent, "Remember that,

no man can be a great advocate, who is no lawyer. The thing is impossible." [1]

The important subjects of controversy likely to arise in any particular suit, will seldom be numerous. Their character can be foreseen by a sharp-sighted man, and their relations to each other and to the law can generally be studied with care before the trial. The lawyers engaged in the cause can, in most cases, acquire a knowledge of these relations superior to that possessed by any other person who is competent to handle them.

Occupying this position, they have the best opportunity to show what they can accomplish, whether in reaching sound conclusions or in leading others to accept their conclusions as being sound. They argue causes from this high vantage ground. The judge and jury first learn of the nature of the suit from their lips. Much depends on first impressions. The most successful advocate is he who can make a favorable impression by his opening statement at the bar, and has given the time and thought necessary to present the case fairly and fully in the way in which he wants to have it strike those whom he addresses.

This may be done by some men, speaking in a conversational tone and with a manner absolutely devoid of action, far more effectively than by others who are born orators, but have been less careful in their preliminary study of the facts. It is also true that what is in any man's power, namely to speak slowly, is even

[1] Jeaffreson, *A Book about Lawyers*, p. 363.

more important than to speak forcibly. One may be forcible, but speak so fast that his train of thought cannot easily be followed without so much effort that either the attempt will be abandoned, or the impressions made will efface each other by the rapidity of their succession.

A distinguished Rhode Island lawyer had this habit of speaking too rapidly. A client once said, after listening to his argument, that it was excellent and convincing but, he added, "from what I know of judges, if he had kept his words a little farther apart, I think they would have had a better chance to settle down among the ideas of the Court." [1]

To speak naturally with a grace and spirit that are sure to attract attention is a great gift but, after all, it can avail little towards winning a favorable decision of a case, even before a jury, except in prosecutions for certain crimes. A Maître Labori can occasionally save a murderess from punishment, but such successes are proof rather of the weakness of the human mind, than of anything that deserves the name of legal skill.

A lawyer should be capable of stating his case so that the court and jury can understand the facts, as he claims them to be, and the law bearing upon them as he claims that to be. He will argue most effectively when he makes this statement the most plain and clear. But it must be plain to those to whom it is addressed. This requires a considerable knowledge of human nature. A man does not talk to a jury as he would to a learned

[1] Abraham Payne's *Reminiscences of the Rhode Island Bar*, Providence, 1885, p. 253.

academy of scholars. He does not talk to an inexperienced or half educated judge, as he would to an able and learned one who has been twenty years upon the bench. He would weary one with what might be indispensable for the information of the other.

The more a case can be rested on settled principles of law, the more impressive will be the argument.

Edmund Burke was a great logician and reasoner. Without the aid of oratory in delivery, his arguments had great weight with those who heard, and greater with those who read them. They bore close study. Coleridge, in his *Biographia Literaria*, says of him that his great distinction lies in trying everything at the bar of principle. His views, it is added, at the commencement of the American Revolution were guided by the same principles and the same deductions which he afterwards applied to the causes of the French Revolution, but the practical inferences which he drew from them, both sound, were almost opposite. The reason was that Burke had, and had sedulously cultivated, the faculty "of seeing all things, actions, and events in relation to the laws that determine their existence and circumscribe their possibility." [1]

Self-confidence is another possession of particular value for a lawyer. It may, of course, be nothing but ill-disguised self-conceit; but, if it be not thus misnamed, it is a desirable quality for every man who would

1 *Works of Coleridge*, New York, 1856, Vol. III, p. 288.

win success in any profession, and to a lawyer, where founded on a just appreciation of one's powers, will be a great help in assuming on occasion a burden which is to be suddenly taken up or rejected.

A young lawyer should not shun responsibility. If an important or doubtful case is put in his hands, he should not ask his client, when it is coming on for trial, to retain older counsel to assist him. To make such a request is a confession either of incompetency or of want of knowledge of his own powers.

The practice of most lawyers is uneven. It differs from day to day in kind, and from year to year in volume. They must be prepared to deal intelligently with business when it comes and as it comes. If a critical case be reached suddenly and unexpectedly for trial, the trial lawyer must be ready to arrange and produce the testimony in proper shape and order, and to bring forward the best arguments that he can frame. He must not be found unprepared for anything that he has undertaken to do. He must be ready, in the intervals of the trial, though at the cost of giving up a meal or a night's sleep, to complete and round out whatever preparation he has made before.

The trial-lawyer's life is one of more strain than the office-lawyer's. Its successes are more brilliant, but they are bought with greater and more concentrated exertion of all the forces of mind and body. No man could try cases to the jury every day in the year. The tension of effort, in pushing through one and then instantly turning to another, week after week and

month after month, would be too great, however iron his constitution might be.

No lawyer will be able to acquire or handle a large practice, unless he gives it close attention. He must work hard for what he gets. Heaven always sells us the good things it bestows on us, says the French proverb.[1] The lawyer pays something for success.

One who would succeed as a lawyer must stand ready to seize opportunities for rendering legal service. It is not enough to have the qualifications. He must be able to show that he has them. Emerson said: "Let any man learn to do some one thing better than the average man is doing it and, though he build his hut in the heart of a forest, the people of the world will make a pathway to his door." This may be true of a hand-worker. His products advertise themselves. "Good wine needs no bush." It is seldom true of the head-worker; — never, until he has shown the public what his head can do for him, and for them. The lawyer cannot make such an exhibition of his powers, unless some occasion gives him a chance, and he is found ready to use it.

A most valuable habit of mind for a trial lawyer is quickness in mental action. He will sometimes have a sudden opportunity to make a point which must be improved the next moment, or never.

Lord Chief Justice Coleridge, when a young barrister, was defending one charged with murder before a

[1] "*Le ciel nous vend toujours les biens qu'il nous prodigue.*"

jury. The court sat in the evening, and as he was making his final argument, it so happened that the lights went out. Very soon the mishap was remedied. "Gentlemen," said Coleridge, in resuming his speech, "you have seen how suddenly the light went out — how quickly it has been restored. It is in your power to extinguish the prisoner's life — but remember, if you do so, it cannot under any circumstance be replaced." [1]

There are few Coleridges and, were there more of them, few chances to make possible so striking an appeal as this. But there are often stages in a legal argument, which can be anticipated, that give room for the use of graphic illustration or epigrammatic phrase. Successful speakers prepare for them well in advance.

Curran had the reputation of striking off happy phrases in his speeches, in the heat of the moment. A friend asked him how this was.

"My dear fellow," said he, "the day of inspiration is gone by. Everything I ever said, which was worth remembering, my *de bene esses*, my white horses, as I call them, were all carefully prepared." [2]

[1] Crispe, *Reminiscences of a K. C.*, p. 82.

[2] Phillips, *Curran and His Contemporaries*, p. 383.

CHAPTER V

THE EDUCATION REQUISITE FOR SUCCESS IN THE LEGAL PROFESSION

Three years' study needed. The terminology and salient points to be learned, first. Institutional instruction. The fundamental principles few, and simple. Studying in an office. Improvements in American Law Schools. Law Reports. Case-books. Judicial opinions with us the conclusive proof of what is law. Instruction in law, both as a science and as an art. Its philosophical foundations. Hegel's view. Study of legal history. Of great historical judgments. Law, a great anthropological document. The different methods of legal instruction. Lectures. Oral discussions encouraged. Dividing large classes. Case-books must cover less ground than text-books. Acquiring a sense of legal proportion. Study of the law of nature and moral philosophy. Of principles first, and authority afterwards. The increase of legal subjects postpones for most the study of comparative law. Law a progressive science. Sociology and Law. Pragmatic philosophy. Logic in law. Legal education useless for some. It requires some native gifts. Good students in other sciences, generally good in law. Continuing legal studies at the bar.

THE American lawyer needs two courses of education: one to fit him to study what law is and how it should be applied, and one to accompany and direct him in doing what he has been thus fitted for. His first course will occupy the whole period of his youth: the second should occupy the whole remainder of his life. Three years of his early manhood should be devoted to legal study from the standpoint of one who hopes to be a lawyer; the rest

of his time on earth to legal study from the standpoint of one who is a lawyer.

The great need of the law student, at the beginning, is to get a general view of the salient points in the law of the country in which he expects to practice. This, of course, requires a knowledge of the terminology of legal science. A principle cannot be understood until it is stated in words of which, as thus applied, the student understands the proper meaning.

These points, and terms, and principles are best learned from short institutional treatises or institutional lectures. Of books of this nature, Lord Bacon, himself the author of one of the earlier ones, said that they must be clear and plain, "not omitting some subjects and dwelling too long on others, but touching upon each briefly, so that to a student afterwards coming to read the whole body of the law nothing may appear wholly new, but as that of which some little notion had been previously imparted (*'levi aliqua notione præceptum'*)."[1]

In some of the American States there are official codifications of municipal law as to most matters of the first importance in determining civil rights. In such States, those should, of course, be read at some stage in legal education, but as they greatly resemble each other this can generally be better deferred till shortly before applying for admission to the bar.

Thus far the beginnings of legal education involve no

[1] *Bacon's Works*, 1803, Vol. VII, p. 458; Aphorism lxxxi.

special difficulty. "No conception held in common by a large number of men such as the members of a State or great community can be very complex in its nature or difficult of comprehension. This may be taken for granted as one of the laws of thought. Consequently the fundamental notions out of which the rules of law are derived must be of this simple character, since it is in the general acceptance and uniformity of these notions that the common law exists as such." [1] An advocate who has been able to show to the satisfaction of the court that they support the claims which he presents, has won his case. He needs cite no authorities. One of the leaders of the New York bar in his day, (Francis N. Bangs), once said that "no man was fit to practice law, that was not able to practice it without law books." [2]

The early American lawyers had few of them. They had studied their profession in lawyers' offices, and by attendance in court. In offices of capable men, who took a real interest in their pupils, this was in many respects no bad way. They received a hundred or a hundred and fifty dollars a year from each, and gave value for it.[3] Business was not so pressing then as now. In the country, particularly, time often hung heavy on a lawyer's hands, and could be well devoted to actual instruction of his pupils, or examinations to see if they had read the books which he had recommended.

[1] *Reports of the American Bar Association,* Vol. XV, p. 342.
[2] Strong, *Landmarks of a Lawyer's Life Time,* p. 273.
[3] A. M. Hamilton, *Life of Alexander Hamilton,* p. 159.

Since the Civil War the proportion of students attending law schools has steadily increased. Fewer men of ability have found leisure or disposition to give instruction to pupils putting themselves under their care. Business methods have largely changed. Students have, in some measure, been crowded out of lawyers' offices by the stenographer and the typewriter. The law schools, on the other hand, have greatly increased in number, and improved in their manner of instruction. There can be no serious question that now they afford, in most cases, the best available facilities for giving a good legal education.

It is universally conceded that its main aim should be to cultivate a familiarity with the more important principles and rules of that system of law under which the student intends to practice, and to promote his ability to discuss their proper bearing on any states of fact to which he may seek to apply them.

In the United States, for the official declaration of most of these rules, one must look to the published opinions of the higher courts as the original source of authority. But these courts have no commission from the State to declare what is a rule of law except in the determination of particular controversies, and then only so far as may be necessary to uphold such judgment as they may render. They do not write law-books. They do not seek to arrange the law in an orderly and systematic form.

Private individuals do this. They take the best definitions of legal rules which they can find in the reports

of judicial decisions, improving them if they can. They separate them into classes, according to their special character. They combine them with statements of law derived from other sources, and suggestions of their own, and so produce a book on some particular topic, or perhaps on the elementary rules and processes of the law on all subjects. Such suggestions will be made in the interest of comprehensiveness of treatment. They will be made in view of what seems fair and just to the writer, who will be always impartial, because having no personal and present interest in the question to which they relate.

But systems of law are constructed out of particular rules as well as general principles. There is a juristic encyclopedia, as the Germans phrase it, that must be taught to whoever would be a true lawyer. He must master it as the beginning and foundation of his professional education.[1]

To aid him in his further studies we have in the United States what has been found in equal measure in no other nation. Only in the United States do judicial opinions express the final word of the sovereign power. The courts of Great Britain must bow to the will of Parliament. The will of the Congress of the United States must bow to the courts of the United States. The will of the legislature of each State must bow to the

[1] See two articles by the author on *The Study of Elementary Law the Proper Beginning of a Legal Education, Yale Law Journal,* Vol. XIII, p. 1; and on *Education for the Bar in the United States, American Political Science Review,* Vol. IX, p. 437.

will of its highest court. Here, therefore, the opinions of the courts are, in Great Britain they are not, the ultimate source, in effect, of written authority.

On the other hand, the unity of the judicial system of Great Britain, with its one final court of appeals for all causes arising in the kingdom proper, and another final court of appeals for all causes arising in her dominions beyond the sea, coupled with the omnipotence of Parliament, avoids that conflict of authority which is the despair of American jurisprudence.

In our American law schools, therefore, we have always made great use of the recorded opinions of our higher courts, in which the reasons for their decisions are stated. Since 1870 this practice has greatly extended. There are now almost no topics of legal instruction which have not been made the subject of a volume consisting of extracts from such opinions, arranged in convenient order, and introduced or interspersed with explanations, largely of an historical character. Such books, called "case-books," are useful in their place, and in many law schools have wholly or mainly displaced text-books on the same subjects which were formerly employed.

As law is both a science and an art, so legal education must aim to give some knowledge of it in each of these forms. There must be scientific instruction for all, but there will be those to whom acquaintance with the law as a science will be the more valuable, and others to whom acquaintance with law as an art will be the more valuable. Professor William C. Robinson made a

clear, though in some respects overstrained, differentiation between these two kinds of instruction, and the class for which each was designed, in these words:

"It is one purpose of legal education to confer a knowledge of the science of the law, to lead the student to the contemplation of fundamental principles, to teach him how to draw from them impregnable conclusions, to exhibit principles and conclusions to him in their relations to other necessary truths, to conduct him down the historic path of social and legal evolution until he knows the present rules of law in their causes and thus perceives, absorbs and assimilates the reason of the law. It is another and quite a distinct purpose of legal education to train apprentices in the art of law, to instruct them in the rules which govern social conduct, in the specific methods prescribed by law for the execution of voluntary acts, and in the modes by which redress for injuries is sought and gained in civil and criminal tribunals. That some students may be able through their superior powers or larger opportunities to avail themselves of both these forms of legal education, and become at once practitioners and scientists, does not remove the radical difference between them, nor justify the continuance of those educational systems which afford only a smattering of commingled art and science, and introduce their victim to professional responsibilities and honors when competent neither to verify nor to practice law." [1]

This would appear to deny to the ordinary student of law as a science any preparation for its practice in court. A system of legal education may be so conducted as to commingle art and science, as each the best interpreter of the other, and in so doing not content

[1] Robinson, *A Study of Legal Education*, Boston, 1895, p. 12.

itself with giving but a smattering of either. Nor are the students few who can profit by such instruction. On the contrary, there are few who cannot.

Pursued in this manner, a legal education naturally leads to the highest walks of human thought. It invites its disciples to take a wide survey of men and manners. They find an inspiration in such suggestions as Hegel's, who would trace the evolution of human reason from logic to the philosophy of nature; from the philosophy of nature to the philosophy of the subjective spirit, that is psychology; from the psychology of the subjective spirit to the psychology of the objective spirit, that is to the philosophy of law and of history; and finally from the philosophy of law and history to the philosophy of the absolute spirit, that is to the philosophy of art, religion, and philosophy itself. Then, he declares, attaining this level, the spirit of man rises to consciousness of itself and of the origin and essence of the universe. There is too much, no doubt, of a transcendental tone to this, but it is certain that the paths of law and history, from whatever point of view they are studied, often intertwine. Law is indeed, in its essential nature, a silent historian, infallible in judgment, unequaled in accuracy, always at work to perpetuate the memory of every people that deserves a place in the records of the world. Whoever seeks to learn law is necessarily a student of history, and he will soon find that law is the best recorder of its development on the lines of social justice and constitutional right.

An ancient piece of legislation often has a high value,

as an historical document, in showing what rights the people where it was adopted deemed most in need of protection by or against the State, and also most worthy of it. It will show, further, on what safeguards they deemed it reasonable to rely. If they should be under the rule of a king, the same thing would be true. Neither statute nor royal decree will endure unless it be one to which its framer thought with reason that the people would be ready to conform.

The modern historian does not forget this, nor did it wholly escape the attention of the ancient world. Sempronius Asellio, himself a soldier, said, in a day when military glory counted for the most, that to write of wars, and triumphs, and their dates, to dwell upon campaigns and their events, and not inquire what decrees meanwhile came from the senate, what statutes from the people, nor from what motives these wars were waged, was to tell stories for children, not to write history.[1]

There have been judgments in and also out of England and the United States which were the beginning of new epochs. Such were those in Hampden's ship-money case (1638); the case of the Seven Bishops (1688); Winthrop v. Lechmere in New England (1727); the prosecutions against John Wilkes (1764); Miller Arnold's Case, in Prussia (1779)[2]; the Trial of Queen Caroline (1820); Chisholm v. Georgia (1792);

[1] *Aulus Gellius,* Lib. V, Cap. 18.

[2] Carlyle, *Life of Frederick the Great,* London, 1858–1865, Vol. X, Ch. 7.

Dartmouth College v. Woodward (1819); the Dred Scott case (1857); the Milligan Case (1866); the Slaughter House cases (1872); Munn v. Illinois (1876), and the Dreyfus court martial in France, of 1899. Cases like these have served to define the real limits of governmental order. They afford new station points. So much has been settled, to reason from. "I am convinced," once said Cavour, "that Order is necessary for the development of society and that of all the guaranties of order, a legitimate power which has its roots in the history of the country is the best."

To become a well-read lawyer requires not only a study of history, but a philosophical study of it. There is an attraction in this to any thoughtful man, though he may never expect to have occasion to make any money-getting use of his investigation. As Mr. Justice Holmes of the Supreme Court of the United States has said:

"It is perfectly proper to regard and study the law simply as a great anthropological document. It is proper to resort to it to discover what ideals of society have been strong enough to reach that final form of expression, or what have been the changes in dominant ideals from century to century. It is proper to study it as an exercise in the morphology and transformation of human ideas. The study pursued for such ends becomes science in the strictest sense. Who could fail to be interested in the transition through the priest's test of truth, the miracle of the ordeal, and the soldier's, the battle of the duel, to the democratic verdict of the jury! Perhaps I might add, in view of the great increase of jury-waived cases, a later transition yet —

to the commercial and rational test of the judgment of a man trained to decide. . . . History is the means by which we measure the power which the past has had to govern the present, in spite of ourselves, so to speak, by imposing traditions which no longer meet their original end. History sets us free and enables us to make up our minds dispassionately whether the survival which we are enforcing answers any new purpose when it has ceased to answer the old." [1]

In the Harleian Miscellany [2] there is preserved a letter of advice from William Cecil, Earl of Salisbury, to a newly appointed Secretary of State, as to the discharge of his office, in which occurs this passage:

"Touching the Lawyers of the Country, esteem them of learning, so they lack not too much Honesty, but in no wise seem to favor these Demy-Lawyers, except you see Perfection of Honesty, for in all Countries they have least Skill and do most Harm."

The demi-lawyer will always be found wherever there is a numerous bar. He is not often the "Perfection of Honesty." He has not honestly studied his profession. He has got into it for what it is worth in the goods of this earth. Philosophical questions will not trouble him, nor would their study be of benefit to him. But for such this volume is not written.

There are various methods of legal instruction. One is planned to lay the greatest stress on a study, at least

[1] *Harvard Law Review*, Vol. XII, pp. 444, 445, 452.

[2] Vol. II, p. 265.

at the outset, of such text-books as have been described, supplemented by lectures. In another, use is made of them only at the outset, or not at all; reliance being had mainly on case-books, supplemented by oral explanations. Other methods of instructions are combinations of those which have been delineated; embracing something of the distinctive features of each.

Lectures are less used in the United States than formerly as a method of instruction. They furnished the easiest way for a teacher of law to teach, or to appear to teach. But the easiest way either of teaching or learning is seldom the best. It takes effort to produce result. Law is not drunk in as our native language is, or even as our native institutions are. Part of it is derived from days and lands of very different institutions, and very different ideas. Its rules often seem harsh and wrong. They sometimes are. They always are in part, let us believe; else were our legislatures busy to little purpose.

To learn law one must study law, and the lecture-room is but an indifferent place to study in. One can get suggestions, facts, rules, principles, inspirations there, but he must go elsewhere for reflection, comparison, digestion, consultation.

Nothing falls so dead on the ear as a lecture on an abstract subject, which is written out in full, and read, word by word, to the audience. Having ears they will hear not. Is not the same thing, they may well ask, to be read in printed books, to better purpose, in half the time? A law lecture, to be worth anything to ordinary

men, must be delivered in more or less of a colloquial manner. No doubt there must, if it is more than elementary, be full notes before the speaker; certain propositions should even be written out, and perhaps dictated in precise terms; but the general current of his words should flow naturally and freely, as one talks to his friend. Questions should be encouraged on the part of the student, and time cheerfully given for their answer, if they are not too difficult, on the spot. This will, no doubt, break in on the continuity of treatment of the topic in hand. It will render the lecture less finished. It will give more prominence than it deserves to some one or two points. But these will be points which interest at least one student. If obscure to him, they are not unlikely to be obscure to some of his comrades. The interruption of the line of the lecture challenges the attention of every one in the room. They are curious to hear the question; curious to hear how the professor will treat it. He has, at once, a hold on the audience, and if he is a ready man, will not be slow to take advantage of it.

But, taking the lecture at its best, it is only the beginning of the student's work. It is a hasty review of some large subject by one familiar with it, before many who are unfamiliar with it. To make it of lasting value, there must either be a wearisome taking or transcribing of notes, or resort to published works on the same topic.

The great bulk of legal education therefore is now through books. A chapter in a text-book, or a group

of cases in a case-book, is daily given out as a subject of discussion for the next exercise. To make it of the most value, much of exposition, illustration and addition, perhaps a little of subtraction, will be needed in the class-room. The great object in view is not such an examination as to show how much of the day's lesson the student has read and how much he remembers of it, but one to ascertain how well he appreciates the meaning and force of what he has thus been asked to study, and how the positions taken in the books can best be defended, criticized, or applied.

The members of the class are not to be treated like school-boys. The instructor should try to find out from them not so much how the author in his work, or the judge in his opinion, lays down any rule of action, as why he lays it down. The faculty of reasoning on law questions can be taught in few ways better than this. The fullest and freest questioning should be invited. "Fools can ask many questions that wise men cannot answer." There will be hard questions put, and foolish questions put. There will be found in every class the bumptious man who thinks he can pose the professor, and is only trying to do that; the thick-headed man who hardly understands how to put his questions, or what the question is that he wants to put; the man who has just read some newspaper item about a justice-of-the-peace suit in Maine or Oregon, and wants to know if the decision was right; and the man who wants advice about some case which his father is thinking of bringing. But there will be also the intelligent, quick-

witted student, who is dissatisfied with some conclusion stated in the book, or detects some dark point that has been glossed over in an opinion, and asks what he really wants to know, and because he wants to know it.

To make such a recitation most useful, a large class must, of course, be cut up, in college fashion, into divisions. There should be an opportunity, daily, to ask every man who is willing, two or three questions during the hour. A few will be unwilling, or but half-willing. A plan often tried is to assign a certain number of the front seats in the class-room to those who are willing, and to assume that those who, on any day, sit elsewhere, are not prepared to be questioned. The shy man, the middle-aged man, who has broken down in some other business, and has determined to try the law, the man who feels above being questioned like a boy, the shirk and the dunce, can then keep in the rear, if they choose.

But it may be predicted of any such class that the successful lawyers in it will almost always come from the front seats. The legal profession demands promptness, alertness, readiness to seize and improve every fair chance of fair advantage. These are things for the law student to cultivate, lest, when his day of judgment comes, it is found that the shy man is shy still, the shirking man a shirk still, the stupid man a dunce still, the airy man airy still. They may all build up for themselves a better character, and the front seat of a class-room is a good place to begin in.

Instruction based on a case-book cannot cover as

much ground as instruction based on questions discussed in a text-book or a course of lectures. Too much space is needed for the frame and setting. The case-book must always be in substance a series of fragmentary discussions of particular topics, interspersed with fragmentary portions of opinions from reported cases. The discussions are excellent as far as they go. The fragments of the opinions of the courts are well selected. The torso is there: if the arms and legs — the posture and *motif* — are not, it is only because there was not room for them in the collection.

A statue, to pursue the illustration, is a work of art. Every art has its rules and principles. These have been formulated by men of skill and experience. They are expressed in words. They are also expressed in marble. But the marble speaks all that is in it only to the initiated, the instructed. To gaze upon it brings to all men pleasure, elevation of thought, perhaps a realization of history, an impulse toward the ideal in life. But that one may feel thus and think thus does not make him an artist. A study of a thousand statues could not make him even a good stone-cutter. He needs the direction of a master, the light of books, the dry mathematics of anatomy.

No science can be learned purely from particulars. The universals must be studied to discover what the particulars mean and whence they sprang.

No important case, involving nice discussions, and striking out in new directions, can be of its best service to him who does not know what went before it and what

has come after it. Law is a science of relations. The first thing for a law student to strive after is a sense of proportion. What is important and what unimportant? What is settled and what still in dispute? What was the starting-point from which the judge who delivered the opinion set out? What was the turning point of the case? Is the logic sound, the conclusion certain, the result valuable?

These call for a judgment of one who knows more of the subject in hand than any compilation of cases can put before him. It was with this in view that Mr. Justice Bradley of the Supreme Court of the United States once said of the object of legal study:

"The law is a science of principles, by which civil society is regulated and held together, by which right is eliminated and enforced, and wrong is detected and punished. Unless these principles are drawn from the books which a student reads, and deposited in his mind and heart, his reading will be but a dry and unprofitable business. On the contrary, if these principles are discovered beneath the dry husks of the text-books and reports, if they are extracted, mastered and retained, it will not be so much the number of the books studied, as the success in which this digesting and assimilating process is pursued in studying them, which will make the great and successful lawyer." [1]

It is of great assistance in forming these general notions of what law is, if at some stage in his legal education the student endeavors to gain some acquaintance with what it was under the Roman emperors. Such an

[1] *Great American Lawyers*, Vol. VI, Philadelphia, 1909, p. 402.

attempt, for most, is best deferred until soon before or soon after entering the bar. The great multiplication of modern agencies for doing the work of the world has forced the creation of new departments of legal science. There is now the law of the railroad, of the telegraph, of the telephone, of the private business corporation. There is a constitutional law, which determines the limits of governmental action. It is more important for the law student to know something of these subjects, than to read the institutional works of Rome, or the *Code Napoléon*, and there are few who can accomplish both. Formerly many could, because the circle of strictly American law was so much narrower.

John Adams, in 1759, when a law student, wrote in his diary this advice to himself:

"Labor to get distinct ideas of law, right, wrong, justice, equity; search for them in your own mind, in Roman, Grecian, French, English treatises of natural, civil, common, statute law. Aim at an exact knowledge of the nature, end and means of government. Compare the different forms of it with each other, and each of them with their effects on public and private happiness. Study Seneca, Cicero, and all other good moral writers; study Montesquieu, Bolingbroke, Vinnius, etc., and all other good civil writers." [1]

In a sketch of James Otis, perhaps the greatest American lawyer in the years immediately preceding the Revolution, President Adams in his old age reiterates these

[1] *Life and Works of John Adams*, Vol. 1, p. 46.

thoughts. Otis, he wrote, was "a great master of the laws of nature and nations. He had read Puffendorf, Grotius, Barbeyrac, Burlamaqui, Vattel, Heineccius; and, in the civil law, Domat, Justinian, and, upon occasions, consulted the *Corpus Juris* at Large. It was a maxim which he inculcated in his pupils, as his patron in the profession, Mr. Gridley, had done before him 'that a lawyer ought never to be without a volume of natural or public law, or moral philosophy on his table or in his pocket.'" [1]

A similar injunction, as concerns the study of morals, was given, in the next generation, by Theophilus Parsons, afterwards Chief Justice of Massachusetts, to John Quincy Adams, when he was studying under him. Parsons advised him to spend part of his time in the study of ethics; saying that no man should enter the bar unless his moral principles were strongly established, else the necessity he would come under of defending indiscriminately the good and the bad might lead him imperceptibly into universal skepticism.[2]

The way in which the American lawyer formerly sought to master his profession is well described by the late Senator Hoar of Massachusetts in these words:

"The old lawyer and the old judge began his education by obtaining, as far as might be, a mastery of legal principles. In general his first inquiry was, if any legal problems were presented to him, if it were a question of common

[1] *Niles' Register*, Vol. I, N. S. 361.

[2] *Proceedings of the Massachusetts Historical Society*, 2d Series, Vol. XVI, p. 349.

law, 'What is the just general rule?' If it were the question of the construction of a statute, 'What construction of the statute will make of it a just general rule?' In applying the common law to any state of facts he took it for granted that the common law was the perfection of reason, and that it contained what the experience of ages had found to be the most just and convenient rules of conduct for mankind in dealing with each other in matters concerning property, or reputation, or liberty, or life. When the student, or the counselor at law, or the judge had made up his mind on that, he then considered the adjudged cases with the view of fortifying his own opinion by their authority. If he found them in conflict with that opinion, before yielding to them, he did his best to reconcile them with his idea of justice, to limit and restrict them as far as possible and, unless the current of authority were too strong, to get them overruled if they were wrong. The study of law was a study of ethics or moral philosophy." [1]

In general, this may be accepted as still describing the influences and motives that should guide the law student who is desirous to win a high place in his profession. It may not unjustly be accused, however, of leading too distinctly to an exaggerated valuation of the common law.

The lawyer must always be on his guard against accepting traditional views too unreservedly. Law is a progressive science and he must watch the signs of progress, as they come in view. He must do his part in contributing in law, as in everything else, to general social advancement. But he must know the past in or-

[1] *Massachusetts Historical Society Proceedings*, Vol. XVIII, p. 159.

der to plan the future. He must also stand firm in defense of constitutional safeguards in favor of individual liberty. Oppression by organized society was a thing to be afraid of until the American and French revolutions set up those safeguards. If they are neglected or discredited, and class legislation goes too far, history may repeat itself. An American sociologist has recently given his views as to a proper training for the bar. They are these:

"Lawyers need a thoroughly modern education which means that they should not study much law. They need to get the biological or evolutionary point of view, to conceive of society as on the way to being different. The authoritative solemnity of the legalist needs to be mitigated; justice does not reside in the breasts of judges unless judges look upon life unfettered by tradition. There is a better intelligence than that represented by the law. There is a valid idealism which is everywhere blocked by legalism. It is unfair to measure the intelligence of a people by their institutions, provided a tradition-reversing type is in a position to apply a strangle-hold on new thought through power to interpret and to pass on the constitutionality of laws. With government thus subject to the legal mind, popular intelligence cannot function happily."[1]

There is a half truth here. The Anglo-American law grew up under social conditions some of which have passed away, and some are passing now.

We come here to a point where the philosophy of pragmatism calls for consideration. Is the theory of a divine revelation of the principles of human law to be

[1] Weeks, *American Journal of Sociology*, Vol. XXI, p. 397.

taught, or to be rejected, or to be passed over in silence? Shall we say, with the Roman Stoics that there is a law of nature, into which every man is born? Or is law a mere expression in each government of the sovereign's will? Or is it whatever rule promises to be the most profitable for a people to follow and courts to recognize in their behalf?

An inclination towards the theory last suggested seems indicated in an address on legal education given in 1897 by one of the most distinguished of American jurists, Mr. Justice Oliver Wendell Holmes, in an address before the Boston University School of Law. What was to be taught there, he said was that "a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; — and so of a legal right. . . . The first thing for a businesslike understanding of the matter is to understand its limits, and therefore I think it desirable at once to point out and dispel a confusion between morality and law, which sometimes rises to the height of conscious theory and more often, and indeed constantly, is making trouble in detail without reaching the point of consciousness. We can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. . . . I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is

inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate and often unconscious, as I have said. When socialism first began to be talked about, the comfortable classes of the community were a good deal frightened. I suspect that this fear has influenced judicial action both here and in England, yet it is certain that it is not a conscious factor in the decisions to which I refer. I think that something similar has led people who no longer hope to control the legislatures to look to the courts as expounders of the Constitutions, and that in some courts new principles have been discovered outside the bodies of those instruments, which may be generalized into acceptance of the economic doctrines which prevailed about fifty years ago, and a wholesale prohibition of what a tribunal of lawyers does not think about right. I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions."

Whatever law may be in its essential nature, it is certain that it moves by logical processes. The law student who is well trained in these, as applied to other subjects, will find constant occasion to recognize their value in attaining legal truths and detecting legal

fallacies. Judge George H. Smith, in his treatise on Logic,[1] gives some apt illustrations of this. One fault of statement obviously is an illicit substitution of terms. Austin, for instance, describes law as the product of sovereignty, and sovereign power as incapable of legal limitation, and then refers to it as consequently "legally despotic"; whereas to be legally despotic is to be despotic by law, and — according to Austin — law is only the expression of the will of the sovereign. So Chief Justice Marshall, in the Georgia Land Fraud case,[2] held that an executed grant was a contract within the meaning of the constitutional prohibition of State laws impairing the obligation of contracts; and so that impairing the obligation of a contract was effected by impairing a past grant. The term "impairing a contract" was thus substituted, according to Judge Smith, for the term "impairing the obligation of a contract." Be this as it may, there certainly are many cases in courts in the argument of which there is either an illicit substitution of new terms as the equivalent of terms previously used, or an illicit substitution of a new sense for a term, previously employed in another — the fallacy technically called Equivocation.

But the faculty of logical reasoning is one of those that, for ready use, must be born in the man. It was born in Lincoln, of whom John Hay said that he could

[1] Smith, *Logic or the Analytic of Explicit Reasoning*, New York, 1901, p. 200. Cf. *id.*, 163.

[2] Fletcher v. Peck, 6 *Cranch's Reports*, p. 135.

"rake a sophism out of its hole, better than all the trained logicians of all the schools."

There are many men on whom a legal education would be thrown away, and many on whom it daily is being thrown away. Education does not create. It improves. It discloses what is already there. It consists in drawing out — leading out — what already exists, inside. We develop from within. We are what we are; but it takes a drawing out process to show what we are.

Somebody has said that every human being is composed of two human beings: one of them always very sagacious, and the other of them not at all sagacious. If so, the sagacious being does not show himself simply in throwing up the hand in order to ward off a sudden and unexpected blow, or any of those movements which we are pleased to call instinctive. He shows himself also in sound moral sense; in seeing a point, as we say; in deliberate good judgment; in every day practical wisdom.

Education cannot make lawyers. It can help draw out and put in more active shape those inherent qualities to which I have alluded, and others of like kind. One of the leaders in his time of the American bar, Charles O'Conor, once said: "A great lawyer is not the one who knows the most law, but who understands exactly the point involved." Such an analytic faculty is one of God's gifts. Man can sharpen, but not supply it. The inner man is the real man, but in half the world he does not have a fair chance to show himself at

its best. The leading American law schools give this chance to those who enter them. If they are men who have made the most of their previous education, they will be pretty certain to make the most of this. If they are college graduates, their rank in College will probably compare closely with that in their law classes.

It has been often said that a man who has been a shirk in college may prove a leader when he passes into the law school. In fact, this seldom happens. Statistics show that the better scholars in law are those who have been among the better scholars during the period of their previous training.[1]

A lawyer's education never ends. What may suffice to secure his admission to the bar simply ends one stage of it. The best lawyer is the one who makes the most progress in the second stage. The first years of this are the most important. He will probably have ample time for the work. Entering the bar to most men brings perforce the opportunity for further study. A young lawyer seldom has clients enough to employ all his time. If he begins as an office clerk, he will generally have his evenings, at least, at his own disposal. He will prosper best in after years, if he uses these first ones for close and continued study of two things: — law and literature.

Senator Chauncey M. Depew has urged this in these words:

"The valedictorian of the college, the brilliant victors of the Moot Courts who failed to fulfill the promise of their

[1] See *Harvard Law Review*, Vol. XXIV, p. 497.

youth, have neglected to continue the study and lost the enthusiasm to which they owed their triumphs on mimic battlefields. Business men may have a lucky stroke of fortune; preachers may buy or borrow sermons; quacks may win riches by a patent medicine; but the lawyer can rely on no one but himself. He is like the knight in the ancient tournament, when the herald sounded the trumpet, and he rode down the lists. Whether he splintered his enemy's lance or was unhorsed himself, depended upon his own prowess and skill. Upon his advice men risk their character and fortunes. In the exigencies of the trial he wins or loses by his own knowledge of his case, his ability to draw from a well stocked armory the principles to meet unexpected issues, his readiness to seize and turn to instant advantage testimony which can help to avert the force of that which can harm, by his trained ability to so discern and analyze amidst the mass of conflicting evidence the truth he seeks, and so present his cause to the court and jury, that he brings them both to his own convictions. This can only be done by thorough preparation and laborious study continued all through life. It is very difficult, with no immediate motive to offer incentive, to study and read while waiting for clients. It requires discipline, and is discipline. It tests the question of fitness for the work of the profession."

CHAPTER VI

THE IDEALS OF THE PROFESSION

The maintenance of public order under law. And of justice. Altruism. Malesherbes' defense of Louis XVI. Disregard of personal interest, for others' sake. Modern improvements in the American bar. Its influence in legislation. Law, an applied science. The common law not the perfection of reason. Not fitted to secure justice, in all lands. Justice inevitably comes, some day, to its own. Carlyle's testimony. Cicero's characterization of the rule of right. The attack of Mephistopheles, in Faust, on inherited laws. The opportunity of the lawyer to develop law. Lord Eldon's creation of a new rule of equity. Ignorance of law, not knowledge of it, leads to litigation. Lawyers hold a place of duty to the State, and to Society at large. Chief Justice Ryan's picture of this duty both for lawyers and Judges.

Every man has his ideals, though he may not name them such, or even recognize that they exist. The lawyer cannot fail to recognize the ideals which he ought to pursue in justice to his profession. His whole work in life is devoted to the definition and establishment of public order under law. No one ought to seek to share in that work, who does not feel its essential nobility, and who is not ready to adorn and defend it with the best that in him lies. His practice may be small; his efforts poor. All the more should he struggle to do his part in making justice in common things known and constant. He must be ready to say with Lowell:

> "Still through our paltry stir and strife
> Glows down the wished Ideal.

And Longing molds in clay what Life
Carves in the marble Real."

A lawyer's ideals are imposed upon him by that sentiment of altruism which is the life of his profession. *Noblesse oblige.* Nobility under our institutions does not belong to any individual. If some foreign sovereign decorates an American with a title, it confers no preëminence upon him here. But under our institutions, that nobility of purpose and character which belongs to the legal profession in other countries, belongs to it in equal measure in the United States. It is everywhere, as concerns its most conspicuous office — the advocacy of causes — a profession of strenuous and chivalric endeavor, and honored, as such, now as much as in any former times or other lands. It is the profession of those who contend for the rights of others. Altruism and personal sacrifice are its foundations.

This sentiment was the inspiration of Malesherbes, when he claimed the honor of defending the king whose disregard of his counsels had cost him his crown and was to cost him his life. It was the inspiration of Denman in supporting the rights of Queen Caroline; of Evarts before the Senate of the United States on the impeachment of President Johnson.

Great occasions like these come seldom, but the same qualities of advocacy are displayed and the same duties of advocacy discharged daily, in every American State. Disregard of personal interest in fulfillment of professional obligations; sacrifice of personal convenience to secure the interests of others; putting all one's pow-

ers of mind and body in one supreme effort of concentrated energy at the service of clients; — these are the common story of the contests of the bar.

The advocate can achieve the ideals of his profession without eloquence. Simple, plain, straightforward statement is often better than eloquence. He can achieve them, without any legal learning that could be called profound. A fair knowledge of law, with the power to make the most of what you know, is generally enough. He cannot achieve them without a high sense of the rights of man, as man; without a sincere reverence for the institutions of human justice; without patient, self-forgetful, chivalric devotion to his client's cause.

In a recent treatise by the dean of one of the principal American Law Schools, he says that, taking into account the entire history of the American bar, there has been a deterioration "both in its *personnel*, its corporate mode, and consequently in the public influence wielded by it." [1] I cannot agree with him. The leaders everywhere compare well with the leaders of the eighteenth and nineteenth centuries. The "corporate mode" of the bar has been immensely bettered and assured, and its public influence concentered and strengthened by the formation of the American Bar Association in 1878, and of the numerous affiliated State and local bar associations, a few before, but most after that event.

With their aid, the bar has succeeded in greatly

[1] Stone, *Law and its Administration*, New York, 1915, p. 165.

raising the standard of qualification for admission to it; in relieving the Supreme Court of the United States from a load of business which was beyond its powers to sustain; and in the abrogation of many rules of judicial procedure, some inherited from the prejudices of a half civilized society, and some imposed by unwise statutes. "Ideas," as Wendell Phillips once said, "strangle statutes." The American bar has come under the influence of new ideas, and its work in legislation has been to repeal here and add there, in general conformity to modern thought.

The great ideal to be held up before the members of every profession, is to make it better. For the lawyer it is first to work out a clearer conception in his own mind of the nature of law as an applied science, and its relation everywhere to its national environment.

One of the English leaders of thought as to the philosophy of the law, Sir Frederick Pollock, has spoken thus of this subject of endeavor:

"We have long given up the attempt to maintain that the common law is the perfection of reason. Existing human institutions can only do their best with the conditions they work in. If they can do that within the reasonable margin to be allowed for mistakes and accidents, they are justified in their generation. Even their ideal is relative. What is best for one race or society, at a given stage of civilization, is not necessarily best for other races and societies at other stages. We cannot say that one set of institutions is in itself better or more reasonable than another, except with reference, express or implied, to conditions that are assumed either to be universal in human

societies, or to be not materially different in the particular cases compared. It may perhaps be safe to assume, in a general way, that what is reasonable for Massachusetts is reasonable for Vermont. It would not be at all safe to assume that everything reasonable for Massachusetts is reasonable for British India, nor, indeed, that within British India what will serve for Lower Bengal will equally well serve for the northwest frontier. The first right of every system, therefore, is, to be judged in its own field, by its own methods, and on its own work. It cannot be seen at its best, or even fairly, if its leading conceptions are forced into conformity with an alien mold. A sure mark of the mere handicraftsman is to wonder how foreigners can get on with tools in any way different from his own. . . . Development is a process, and not a succession of incidents. Environment limits and guides the direction of effort; it cannot create the living growth. Hence it seems to follow that a system which is vital and really individual either must be resigned to remain in some measure inarticulate, or must have some account to give of itself that is not merely dogmatic and not merely external history, but combines the rational and the historical element. In other words, its aims are not completely achieved unless it has a philosophy; and that philosophy must be its own."

To a thoughtful man, and to some extent even to a thoughtless one, the practice of law calls attention daily to the causes of things. Is the result of this or that suit to promote justice, or to postpone it? For that somehow justice will finally be worked out, is the ideal of law to be upheld at all times by the legal profession.

Carlyle brought this message sharply home in his *Past and Present:*

"Alas," he says, "how many causes that can plead

well for themselves in the Courts of Westminster; and yet in the general Court of the Universe and free Soul of Man, have no word to utter! . . . For it is the Court of Courts, that same; where the universal soul of Fact and very Truth sits President; and thitherward, more and more swiftly, with a really terrible increase of swiftness, all causes do in these days crowd for revisal, for confirmation, for modification, for reversal with costs. Dost thou know that Court; hast thou had any Law-practice there? What, didst thou never enter; never file any petition of redress, reclaimer, disclaimer, or demurrer, written as in thy heart's blood for thy own behoof or another's; and silently await the issue? Thou knowest not such a Court? Hast merely heard of it by faint tradition, as a thing that was or had been? Of thee, I think, we shall get little benefit."

The court of conscience, administering the golden rule, lies within the range of ideals, entertained in common by lawyers in ancient and lawyers in modern times. Two thousand years ago Cicero declared that "there is one rule of right (*jus*) by which human society is bound together, and which is constituted by one law; which law is the rightful reason of command and prohibition; and he who is ignorant of it is unjust, whether it be written anywhere or nowhere. But if justice is conformity to written laws and public institutions, and if such a one says that all things are to be measured by their utility, let him be careless of laws and break them if he can, who shall judge that this is for his advantage. So it is that there is no justice anywhere if it do not

exist by nature, and that which is set up for its utility be destroyed for another utility. And if nature shall not be ready to confirm the rule of right all virtues will perish. For where shall liberality, where love of country, where piety, where the desire of meriting well from another or doing him a favor be able to exist? For they are born of this, that by nature we are disposed to love our fellow men; which is the foundation of the rule of right. Nor only are services for men cut off, but worship and religious observances as to the gods, which I esteem to be preserved not from fear but from that union which exists between God and man." [1]

It will be observed that the great orator here reaches much the same conclusions as those announced by Jesus Christ and Paul in the following century.[2]

The one, unvarying ideal of the legal profession is to advance and perfect the law which it is created to call into action. It is always in danger of pushing this purpose of improvement too far. It is always in greater danger of not carrying it far enough.

Lovers of Goethe will recall the brilliant scene in Faust's study, when Mephistopheles dons a Professor's cap and gown, and grants an interview to a student who wishes advice as to whether he should study law for his profession. My dear boy, he replies, keep clear of that. Laws and notions of right are inherited like an eternal

[1] Cicero, *De Legibus*, I, XV.
[2] *Mark*, Ch. XII, 31; 1 *Corinthians*, Ch. XIII.

disease: they slide themselves along from generation to generation, and spread imperceptibly from place to place. Reason becomes nonsense, and the best actions are called wrong. Wo to thee that thou art somebody's grandson! Of the legal notions that we are born with there is unfortunately never any question made.

If we strip this charge of its poetic intensity, it is true. The lawyer, and particularly the American lawyer, is naturally a conservative force in human society. He professes a science which some of his predecessors at the bar have praised as the perfection of reason. He must steadily aim to guard himself against sharing that opinion. He must be ready to confess that there are faults in American law and judicial procedure which can be safely eliminated, and to do one man's part, at least, towards getting rid of them.

A lawyer is potentially a discoverer and may have the joy of one. Law is a progressive science. It changes for the better, so far at least as that springing from custom and common consent is concerned, wherever society is advancing.

This gives the young lawyer a great opportunity, a high and not remote ideal. The main principles of law are unchangeable, but new corollaries are always coming into view. He may be the first to discern one of them or to put it in an assured position. If so, he will have his reward.

Lord Chancellor Eldon began his professional career without influential friends and in circumstances of real

poverty. A chancery decree was to be entered, to which all the solicitors engaged in the cause had agreed. One of them retained John Scott (which was the name of the future chancellor) to give his client's formal consent in court before Lord Thurlow. The case turned on the equitable nature and incidents of a fund which was to be, but had not yet been, turned into property of a different kind. A will had directed this change of form, but before it was made, the decree was to be entered. It struck Scott, as he read the papers, that in equity a thing ought to be regarded as done, which ought to be done, wherever this would promote a fair accomplishment of the intention of those who imposed the obligation. In the case before him that doctrine, if applied, would secure an important advantage for his client. He asked the solicitor's authority to raise the point before the court, and received it, on condition that there should be no charge for arguing it. The court took his view and his fortune was made. He had become the father of a far-reaching rule of right, ever since known as that of "equitable conversion."

On the other hand, an ancient rule should not be varied or a new one adopted without careful thought. The chance of this brings an element of uncertainty into the practice of the profession before the courts. The better the education for the bar, the more fully will the student come to feel that while law may be and in principle is a thing of certainty, the result of its administration often is not. With this knowledge, a lawyer

will be always cautious in advising the entry into litigation.

Cicero, in the dialogue which opens his treatise *De Legibus*, throws this distinction into strong light.[1] Asked to explain what law is, he begins by explaining its foundations in the nature of man. Quintus commends this, saying that those who describe the law of a State otherwise, describe not so much justice, as ways of litigation. Not so, Quintus, is the reply. Ignorance of law is litigious rather than knowledge of it.

The "bidding prayer" of Oxford University asks for aid to turn out men "qualified to serve God in Church and State." The lawyer's place is one of service in the State. For this he exists, as a member of a privileged profession, to which is committed a large part in the administration of that law which, however we may name the author, has certain principles as invariable as the law of gravity. Its ideal is to do this service in large and in trivial affairs, alike; by the use of such powers as one may have, be they great or small; with a loyalty to the constant principles of law, not inconsistent with the hope of amending and improving it in minor things; always striving to aid in the world-wide effort, ever being made, to make law and justice one and the same.

In this spirit Chief Justice Ryan of Wisconsin, in an address before the Law School of the University of Wisconsin, used this language:

[1] Lib. I, Cap. 6.

"This is the true ambition of the lawyer: To obey God in the service of society; to fulfill His law in the order of society; to promote His order in the subordination of society to its own law adopted under His authority; to minister His justice by the nearest approach to it under the municipal law which human intelligence and conscience can accomplish. To serve man by diligent study and true counsel of the municipal law; to aid in solving the questions and guiding the business of society according to law; to fulfill his allotted part in protecting society and its members against wrong, in enforcing all rights and redressing all wrongs; and to answer before God and man according to the scope of his office and duty for the true and just administration of the municipal law. There go to this ambition, high integrity of character and life; inherent love of truth and right; intense sense of obedience, of subordination to law, because it is law; deep reverence of all authority, human and divine; generous sympathy with man, and profound dependence on God. These we can all command. There should go high intelligence. That we cannot command. But every reasonable degree of intelligence can conquer adequate knowledge for meritorious service in the profession." [1]

These words came from a great judge and one who set a high standard also of duty for the bench. He composed a prayer in a similar line of thought for his daily use, which is here given both as one of the gems of judicial composition, and one of the lights by which every judge might well guide his official course, in seeking to promote his ideal of justice on earth:

"O God of all truth, knowledge and judgment, without

[1] Winslow, *The Story of a Great Court*, p. 316.

whom nothing is true or wise or just, look down with mercy upon Thy servants whom Thou sufferest to sit in earthly seats of judgment to administer Thy justice to Thy people. Enlighten their ignorance and inspire them with Thy judgments. Grant them grace truly and impartially to administer Thy justice and to maintain Thy truth to the glory of Thy name. And of Thy infinite mercy so direct and dispose *my* heart that I may this day fulfill all my duty in Thy fear, and fall into no error of judgment. Give me grace to hear patiently, to consider diligently, to understand rightly and to decide justly. Grant me due sense of humility, that I be not misled by my willfulness, vanity or egotism. Of myself I humbly acknowledge my own unfitness and unworthiness in Thy sight, and without Thy gracious guidance I can do nothing right. Have mercy upon me a poor, weak, frail sinner, groping in the dark; and give me grace so to judge others now, that I may not myself be judged when Thou comest to judge the world with Thy truth. Grant my prayer, I beseech Thee, for the love of Thy son, our Saviour, Jesus Christ. Amen." [1]

[1] *Ibid.*, p. 313.

THE END

INDEX

Accident cases, 57
Adams, Charles Francis, 2d, 51
Adams, Henry, 51.
Adams, President John, 16, 44; plan of legal study, 132, 133
Adams, President John Quincy, 44
Advertising, 59
Advocates, personal sacrifices, 143
American Bar Association, 49, 54, 61, 144.
American Bar has grown better, as time went on, 144
Amicus curiæ, 11
Anacharsis, 101
Analytic faculty, 139
Andrew, Gov. John A., quoted, 23
Antiquated procedure, 91.
Arbitration, international, 67
Argumentation, legal, 16, 18; brevity, 26, 27
Aristotle, 101
Art, law is an, 22
Attorneys. See Lawyers. Degradation of name, 73
Austin, John, on sovereignty, 138

Baldwin, Roger S., 46
Ballantine, Sergeant, 48
Bar, attractions of, 5; discipline of, 9; American, 14; traditions of, 16; English, 42, 76; overcrowded, 43, 44, 54; a monopoly, 60; *esprit de corps*, 60
Barristers, number of, 43; income of, 46; no partnerships of, 50
Bayard, James A., 106
Benjamin, Judah P., 47
Bleckley, Chief Justice, 77, 92, 99
Boards, practice before, 66
Boilean-Despreaux, 71
Bolingbroke, quoted, 13, 72
Bradley, Justice Joseph P., quoted, 131
Bramwell, Baron, quoted, 78
Bright, John, quoted, 27
Brother, term of address between lawyers, 62
Brougham, Lord, 20
Bryce, Lord James, 41, 46
Burke, Edmund, 24; quoted, 28, 54, 111
Business, variety of legal, 62

Campbell, Lord, 76
Carlyle, Thomas, quoted, 27, 146
Carter, James C., quoted, 30
Carter, Orrin N., quoted, 77
Case-books, 120, 125, 126, 128–131
Case-lawyers, 103
Cecil, Lord William, quoted, 125
Character, good, 106, 152
Chitty on Pleading, 16
Choate, Joseph H., 46

Cicero, quoted, 5, 10, 24, n. 1, 25, 32, 83, 147, 151
Clients, duties to, 80, 89, 108
Cockburn, Lord, 81
Codification, 95–97
Coke, Sir Edward, on Littleton, 16; income, 47
Coleridge, Lord Chief Justice, 113
Coleridge, Samuel T., quoted, 31, 87, 111
Common Law, 23–95, 134, 145
Comparative Law, 131, 132
Conflict of laws, 120
Conkling, Roscoe, 46
Construction of documents, 33
Contingent fees, 49
Counsel, right to have, 8
Courts, authority and function, 7; preventive powers, 40; making law, 118; declaring statutes unconstitutional, 119
Crispe, Thos. Edward, Reminiscences quoted, 50
Cromwell, Oliver, 30
Cross-examination, 90
Curran, John P., 51, 52, 114
Curtis, Justice Benjamin R., 56
Custom, 6, 149

Denman, Lord, 143
Depew, Chauncey M., quoted, 140
Dialectic, 18
Divine law, 135
Doe, Chief Justice, 102
Duty to clients, 83
Dwight, Professor Theodore W., 107

Education, legal, 115–141; progressive character of, 54; never ends, 115; beginning of, 116; from books, 115; lectures, 126; statutes, 116; in an office, 122; different methods of, 125
Edwards, Pierpont, 44
Eldon, Lord, 47, 149, 150
Ellsworth, Chief Justice Oliver, 79
Eloquence, 144
Emerson, Ralph Waldo, quoted, 113
Employers' Liability Acts, 56, 57
Equitable conversion, 150
Erskine, Lord, 47; opinion of a trial lawyer's duty, 79, 117, 118; studying philosophically, 122, 124
Equivocation, 138
Estates, practice in settling, 66
Ethics, legal, 49; standard of raised after 1850, 74
Ethics, studying for its bearing on law, 133
Evarts, Wm. M., 46, 143
Evidence, legal, 22; artificial rules, 100
Evolution, law a process of, 135

Faust, 148
Fees, amount, 44–49, 55, 56; contingent, 49
Forbes, Sir Wm., 82
Forms, necessity of, 91
Fraternity of the Bar, 60

Gladstone, Wm. E., 27
Goethe, 148
Golden rule, 148
Great Britain, unity of legal system, 119, 120
Growth of law, 97
Guilty, defending the, 79 *et seq.*

Habits, a lawyer's, 87

Hadley, Arthur T., quoted, 62
Hague Tribunal, 67
Hale, Sir Matthew, 80
Haller, 19
Halsbury, Lord, quoted, 78
Hamilton, Alexander, 45, 49, 60
Hamlet, 71
Hay, John, 138
Hegel, 122
Hermeneutics, 34
History, lawyers must study, 14
Hoar, Senator Geo. F., quoted, 133
Holmes, Justice Oliver Wendell, quoted, 124, 136
Hubbard, Thomas H., 89

Ideas, 145
Ideals of the legal profession, 142–153; justice the basis, 146
Imagination, 107
Influence, a lawyer's, 37
Institutions, changes in legal, 15
Instruction, legal modes of, 115–141
Interpretation, legal, 34
Isadore of Seville, quoted, 39

Jacks, Professor, 24
Jeffreys, Chief Justice, 12
Johnson, Reverdy, 45
Johnson, Samuel, 81, 82
Joubert, 86
Judges, function of, 7; must be lawyers, 37
Judgments, as historical landmarks, 123
Judicial legislation, 95–99
Jury, trial by, 25, 100–102; development historically, 124
Jus, 147
Justice, underlies law, 6, 151, 182; political, 23; sometimes works injustice, 95

Labori, Maître, 110
Land titles, searching, 57, 58; Torrens system, 58
Law, both a science and an art, 120, 121; a science of relations, 131; an applied science, 145; definitions of, 5, 6, 37, 87; how made, 7; comparative, 16, 131, 132; justice in, 27; relation to civilization, 33; changes in, 98, 134, 149; official statements of, 118; scientific arrangement of, 118; a silent historian, 122; Law Schools, 118, 120; class-room exercises, 126–130; what they offer, 140
Law-suits, theory of, 82; of doubtful issue, 86
Lawyers, function in court, 7; admission to the bar, 7; have a franchise, 8; duties and aims, 142; right to have services of, 8; each is an officer of court, 8; advising not to sue, 10; office of, 21; duty of research, 28; study of literature, 28, 140; hold a public trust, 32, and office, 35; influence of, 37; on government, 38; liability for negligence, 49; generally inclined to conservatism, 149; groups of, 62, 63; variety of functions, 64; popular view of, 71, 73; trickiness, 72, 73; conditions of success, 106 *et seq.*; young lawyers have great opportunities for improvement, 140
League of Nations, 68
Lecky, Wm. H. H., 29

Lectures in Law Schools, 126
Legal Aid Societies, 56
Legal education, cannot make lawyers, 139; in sociology, 135; never ends, 140; aims and ideals, 152
Legislation, a lawyer's part in, 29, 30; judicial, 95–99
Lincoln, President, quoted, 23, 36; Seward's estimate of, 25; logical powers, 138
Litigation, discouraging, 36, 69
Litigiousness, 9, 151
Logic, 16, 137

Macaulay, Lord, quoted, 75
Mandeville, quoted, 72
Malesherbes, 143
Mansfield, Lord, 19, 47
Marshall, Chief Justice John, 45, 138
Martin Luther, 44
Mason, Jeremiah, 44
Maxim, Sir Hiram S., 75
Maxims, legal, 17
Milton, quoted, 18
Ministry, claims as a profession, 1–3, 31
Moral philosophy as a legal study, 133, 134
Morality sometimes confused with law, 136

Napoleon, influence on the courts, 39
Nature, laws of, 22, 135

O'Conor, Charles, quoted, 139
Office lawyers, 64, 112
Oratory at the bar, 25, 108
Ordeal, 124
Order, public, 142; the soul of law, 124
Otis, James, 132, 133
Oxford University, "bidding prayer," 151

Pandects, 21
Parker, Courtlandt, quoted, 31
Parsons, Chief Justice Theophilus, 45, 133
Particulars, study of, 130
Paul, St., 148
Pendennis, 13
Personal qualities, 106
Peter the Great, 33
Phillips, Wendell, 145
Philosophy of law, 21
Pinckney, Wm., 45
Pleadings, legal, 21
Pollock, Sir Frederick, quoted, 6, 165
Pomeroy, Professor John N., quoted, 40
Pope, Alexander, quoted, 71
Practice, sharp, 75
Pragmatism, 135
Prayer, the Oxford "bidding prayer," 151; Chief Justice Ryan's, 152
Preparation for the Bar, 1
Principles, decisions resting on, 111
Private way, 98
Procedure, legal, 15, 91 *et seq.*; judicial control over, 102
Profession, choice of, 1–4; many now to choose from, 42; overcrowding, 42; character of legal, 72
Public service, 31
Psychology, 25, 29, 122

Queen Caroline's case, 80, 81
Quickness, 113

Reading, Lord Chief Justice, 103

Relations, legal, 20, 92
Remedies, legal, 24
Reports, judicial, 7, 102–104, 118, 120
Retainer, refusing a, 84
Reverence, 22, 23
Rhetoric, 16
Rights, duty to enforce, 10; unjustly exercised, 19; legal remedies, 24; unenforceable, 27
Robinson, Professor W. C., quoted, 120
Roman law, its view of lawyers, 21, 35; defects in, 97; study of, 131, 133
Roosevelt, President Theodore, quoted, 38
Rousseau, Jean Jacques, quoted, 28
Ruskin, quoted, 3
Russia, lawyers in, 33
Ryan, Chief Justice, quoted, 94

Savigny, quoted, 16
Science, Law a, 35
Self-confidence, 111
Sempronius, Asellio, 123
Service, public, 42, 151
Seward, Wm. H., 26
Schaick, Peter Van, 74
Schiller, 108
Schopenhauer, 18, 70
Scott, Sir Walter, 15, 72
Shaw, Chief Justice Lemuel, 45
Sherman, Roger Minott, quoted, 1, 2, 3
Sidney, Algernon, trial of, 11
Sill, Edward Rowland, quoted, 12
Smith, Judge George H., on the aid of law from logic, 138
Smith, Sydney, 53
Social advancement, as a judicial consideration, 136, 137; changes basis of law, 145, 146
Socialism, 137
Social justice, 69
Social progress, 124, 134, 140
Social service, a lawyer's part in, 42
Society, organized, 135
Sociology, as a legal study, 135
Socrates, 20
Socratic plan of teaching, 127
Solicitors, English, 43, 64
Sovereignty, Austinian theory, 138
Specialists, 63
Spinoza, quoted, 10
Stamp tax on writs, 74
Statutes, a lawyer's influence in making, 29, 39; and in construing, 84; rules for framing, 39; must be in harmony with public opinion, 123; construction of, 134
Stephen, Sir James, 97
Stoic philosophy, 136
Story, Justice Joseph, 45
Swift, Dean, quoted, 26, 102
Swinney's case, 84

Tenderden, Lord, quoted, 37; income, 47; character as judge, 76; remarks on forms, 88
Thackeray, criticism of lawyers, 13
Title, searching land records for, 58
Tocqueville, Alexis de, quoted, 40
Tooke, Horne, 25
Tradition, 134
Trial-lawyers, 112
Truro, Lord Chancellor, 48

Trustees, lawyers as, 65
Truth, 18, 147

Universals, study of, 130

War, raises new questions, 67
Webster, Daniel, 45
Wigmore, John H., quoted, 16
Wirt, William, 84
Wythe, Chancellor George, 84

Youth, in some things a benefit to a lawyer, 24

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